R RAMA CHANDRAN

v.

INDUSTRIAL COURT OF MALAYSIA & ANOR.

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
EDGAR JOSEPH JR FCJ
WAN YAHYA FCJ
[CIVIL APPEAL NO: 02-13-1994]
20 JULY 1996

ADMINISTRATIVE LAW: *Dismissal of employee - Recommendation to Director General of Industrial Relations - Reference by Minister of Labour to Industrial Court - Industrial Court holding that employee had been dismissed with just cause or excuse - Application to High Court to quash decision of Industrial Court - Refused by High Court but appeal allowed in Federal Court and order of Industrial Court quashed - Whether Federal Court can give consequential relief - Compensation for loss of employment - Rules of the High Court 1980 O. 53 - Courts of Judicature Act, 1964 s. 25(2), Schedule thereto.*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Judicial review - Functions of superior Courts - Whether limited to quashing tribunal's finding and directing it to carry out functions according to law - Whether may also give consequential orders - Whether may scrutinise decisions for both process and substance - Proper approach - Whether to adopt a liberal and progressive approach.*

LABOUR LAW: *Dismissal of employee - Compensation - Whether to remit case to Industrial Court for consequential relief - Whether Federal Court or High Court may grant consequential relief - Jurisdiction of Court - Whether appellate or supervisory.*

In this case the appellant was employed by the Malaysian Co-operative Consumer Society Ltd. (2nd respondent) as a trainee general manager. He was dismissed by the society but after an intervention by the Registrar of Societies he was re-employed by the society as credit control and divisional manager with a reduced salary. Subsequently, however, he was again dismissed and in the letter of dismissal it was stated that he was dismissed as a result of a retrenchment exercise. The appellant made a representation to the Director General of Industrial Relations claiming that he was dismissed by the society without just cause or excuse and asking that he be reinstated to his former post, failing which he should be entitled to reasonable compensation for loss of earnings etc. The Minister of Labour referred the appellant's representation

to the Industrial Court for an award. After hearing the case the Industrial Court held that the claimant was dismissed with just cause and excuse.

The appellant applied to the High Court to quash the decision of the Industrial Court but this was refused. He appealed to the Federal Court which allowed the appeal and unanimously decided to quash the award. Learned Counsel for the appellant submitted that although ordinarily the Court after quashing an award of the Industrial Court would remit the case to the Industrial Court with a direction to make the necessary consequential orders, in the present case, the Federal Court ought themselves to determine and make the appropriate consequential orders. The Federal Court by a majority (Wan Yahya FCJ dissenting) decided to grant the appellant compensation for loss of employment.

Held:

Per Eusoff Chin CJ (majority decision):

[1] The Industrial Court in its award did not at all address its mind to the issue of bias raised by the claimant which is the central pillar of the case. The failure of the Industrial Court to address its mind to this fundamental issue is a serious error which affects jurisdiction and which will result in the award being quashed.

[2] The society in its statement in reply before the Industrial Court had raised four issues of misconduct and in the course of the proceedings before the Industrial Court had even raised two further allegations of misconduct against the claimants. The claimant in his written submission before the Industrial Court had dealt at length with these six allegations of misconduct but the society had totally ignored and did not at all respond to the claimant's answer to the six allegations of misconduct. The Industrial Court in its award had misdirected itself by not considering the issues raised; in particular, it had failed to determine as a fact whether the termination was as a result of a retrenchment exercise or as a result of the claimant's misconduct.

[3] In this case the Industrial Court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on the retrenchment exercise it was not bound and therefore not obliged to consider the issues of bias and misconduct.

[4] The Industrial Court had come to a wrong conclusion when it decided that the claimant was dismissed with just cause and excuse and the award must, therefore, be quashed.

[5] There is no provision in the Courts of Judicature Act, the Rules of the High Court or the Industrial Relations Act expressly or impliedly pohibiting the High Court from granting any relief as provided for in the Industrial Relations Act when quashing an award of the Industrial Court. The Court cannot override an express provision of the law but if there is no express provision in the statute, then the Court can exercise its powers in a suitable case.

[6] It is clear that the High Court and the Federal Court have adopted a liberal and progressive approach in *certiorari* proceedings and when the particular facts or the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to the aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.

[7] In this case the claimant is 51 years old and has been jobless for the last seven years. Owing to his unemployment, he and his family with school going children are suffering immense hardship. To remit the case back to the Industrial Court will certainly involve continued and prolonged litigation which will do harm and injustice to the claimant and were he to die his claim will abate. Based on the facts on record, this is a fit and proper case where the jurisdiction of the Court should not end with the quashing of the award.

[8] The High Court's jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historal development in which the writ of *certiorari* was developed and came to be granted by the Court in England. Of course if the application for *certiorari* is dismissed, that ends the matter. But if the application is allowed the Court has surely to mould the order. If the Court were to grant *certiorari* to quash the award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave injustice.

[9] As far as possible the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its attention. On the facts of the case before the Court, to remit this matter back to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests of the parties. In the circumstances justice demands that to avoid further delay and expense, the Court should determine the consequential relief rathcr than remitting the case to the Industrial Court for that purpose.

[10] The appropriate remedy in this case is to grant the claimant compensation for loss of employment. He must therefore be granted back wages, plus EPF contributions and compensation for loss of future earnings, to a total sum of RM489,000.

Cases referred to:

Malaysian Co-operative Consumer Society Ltd. v. R. Rama Chandran (Industrial Court Award no. 278/1991) ***(cit)***

Goon Kwee Phoy v. J & P Coats (M) Bhd. [1981] 2 MLJ 129 ***(refd)***

Hotel Malaya Sdn. Bhd. & Anor. v. National Union of Hotel Bar and Restaurant Workers [1982] 2 MLJ 237 ***(refd)***

L. Michael and Anor. v. M/s. Johnson Pumps India Ltd. [1975] 1 LLJ 262 ***(refd)***

Kesatuan Pekerja-pekerja Perusahaan Logam & Anor. v. The Honourable Minister of Labour, Malaysia [1991] 3 CLJ 2164 ***(refd)***

Navinchandra Shakerchand Shah v. Ahmedabad Co-operative Department Stores Ltd. [1979] 1 LLJ 60 ***(refd)***

R. v. Barnet London Borough Council, ex parte Nillish Shah [1983] 2 AC 309 ***(dist)***

Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 ***(dist)***

Regina v. Tower Hamlets London Borough Council Ex parte Chetnik Development Ltd. [1968] 1 AC 858 ***(dist)***

Regina v. Immigration Appeal Tribunal, Ex parte Bakhtuar Singh [1986] 1 WLR 910 ***(dist)***

Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 ***(not foll)***

Gujarat Steel Tubes Ltd. v. Mazdoor Sabha [1980] 2 SCC 593 ***(foll)***

Management of City of Bangalore Municipal Corporation Employer Co-operative Society Ltd. v. E.V. Raju [1987] 1 LLJ 22 ***(foll)***

Zainal Abidin v. Century Hotel [1982] 1 MLJ 260 ***(foll)***

Pacific Centre Sdn. Bhd. v. United Engineers (M) Berhad [1984] 2 MLJ 143 ***(foll)***

Dunlop Estate Bhd. v. All Malaysian Estates Staff Union [1980] 1 MLJ 243 ***(refd)***

Nathan v. Barnet London Borough Council [1978] 1 WLR 220 ***(foll)***

Sungai Wangi Estate v. Uni [1975] 1 MLJ 136 ***(foll)***

Minister of Labour, Malaysia v. National Union of Journalists, Malaysia [1991] 1 MLJ 24 ***(foll)***

Thien Tham Sang v. United States Army Medical Research Unit, [1983] 1 MLJ 97 ***(cit)***

Bharat Singh v. New Delhi Tubercolosis Centre [1986] 25 CC 614 ***(foll)***

Conway v. Rimmer [1968] AC 910 ***(foll)***

Per Edgar Joseph Jr. FCJ (majority decision):

[1] It is often said that judicial review is concerned not with the decision but the decision making process. This proposition may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected, or as stated by Lord Diplock in *Council of Civil Service Unions v. Minister for the*

*Civil Servic*e where the impugned decision is flawed on the ground of procedural impropriety. But Lord Diplock's other grounds for impugning a decision susceptible to judicial review makes it abundantly clear that such a decision is also open to challenge on ground of 'llegality' and 'irrationality' and in practice this permits the Courts to scrutinise such decisions not only for process but also for substance. Lord Diplock also mentioned "proportionility" as a possible ground of review which called for development.

[2] The basic ground on which the Court has held that the employee in this case had been dismissed from service without just cause or excuse was that the act of the employer in terminating the services of the employee purportedly in pursuance of a retrenchment exercise was really a device to cloak a colourable or *mala fide* exercise of power or in other words an act of victimisation, thus avoiding a fair inquiry into certain charges of misconduct as required under the rules of natural justice. Furthermore the Court was satisfied that the award of the Industrial Court was flawed on grounds of unreasonableness.

[3] I have carefully considered the question whether the Federal Court should remit the case to the Industrial Court to determine the monetary compensation to be paid by the employer to the employee which will in essencc involve a simple arithmetical calculation but will also lead to unnecessary prolongation of proceedings involving inevitable delay and increased expenditure, in what has already been a long drawn out litigation with consequent hardship to the employee who is now getting on in age.

[4] The Court is concerned in this case with an appeal which arises from judicial review proceedings whose target was an award of the Industrial Court, an inferior Court, and not an administrative decision by bodies or persons who are charged with the performance of public acts or duties. It cannot be said therefore that by intervening in the matter as the Court proposed to do, it would be trespassing into the domain of the Executive and so acting undemocratically.

[5] In the very special circumstances of this case, to remit the case to the Industrial Court to assess the monetary compensation payable by the employer to the employee would seem to be certain detachment from reality and more importantly it will not answer the need of justice. The Court must therefore do what the Industrial Court should have done. In doing so, the Court has pointed the way to new horizons in the forward march of judicial review.

Cases referred to:

Chief Constable of North Wales v. Evans [1982] 1 WLR 1155 ***(not foll)***

Council of Civil Service Union v. Minister for the Civil Service [1985] AC 374 ***(foll)***

Westmister City Council v. Great Portland Estates plc. [1985] AC 661 ***(foll)***

Hall & Co. Ltd. v. Storeham-By-Sea [1964] 1 All ER ***(foll)***

R. v. Barnesley MBC, ex parte Hook [1976] 1 WLR 1052 ***(foll)***

Wheeler v. Leicester City Council [1985] AC 1054 ***(foll)***

London Borough of Brent, ex parte Assegai, The Times, 18 June 1987 ***(foll)***

Ranjit Thakur v. Union of India AIR [1987] SC 2386 ***(refd)***

Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan [1996] 2 CLJ 771 ***(aff)***

Gillick v. West Norfolk and Wisbeck Area Health Authority [1985] AC 112 ***(cit)***

R. v. Panel Take-Overs and Mergers, ex parte Datafin plc. [1987] QB 815 ***(cit)***

Petaling Tin Bhd. v. Lee Kian Chan & Ors. [1994] 1 MLJ 657 ***(foll)***

Notts CC v. Secretary of State for the Environment [1986] AC 240 ***(cit)***

R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 ***(refd)***

Bugdaycay v. Secretary of State for the Home Department, London Borough Council [1987] 1 All ER 940 ***(refd)***

R. v. Cashiobury Hundred Justices [1823] 3 Dow & Ry. 35 ***(refd)***

Prescott v. Birmingham Corporation [1955] Ch. 210 ***(refd)***

Re Amin [1983] 2 AC 818 ***(not foll)***

Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower [1981] 2 MLJ 199 ***(dist)***

Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor. [1987] 1 MLJ 125 ***(dist)***

Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1984] 1 MLJ 363 ***(dist)***

Dreamland Corporation Sdn. Bhd. v. Choong Chin Sooi [1988] 1 MLJ 111 ***(dist)***

Gouriet v. UPOTW [1977] 2 WLR 310 ***(cit)***

Laker Airways v. Department of Trade [1977] QB 643 ***(cit)***

HTV v. Price Commission [1976] ICR 170 ***(cit)***

Breen v. AEU [1971] 2 QB 175 ***(cit)***

Coleen Properties Ltd. v. Minister of Housing and Local Government [1971] 1 WLR 433 ***(cit)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1996[1 MLJ 481 ***(aff)***

Jashingbhai v. Dist. Magistrate, Ahmadebab [1950] AB 363, 52 Bom. LR 544 ***(cit)***

Prabhawati Devi v. Dist. Magistrate [1952] AA 836 ***(foll)***

Chotabhai Jethabhai Patel & Co. v. Union [1952] Nag. 156 ***(foll)***

Amardas v. Pepsu [1953] Pep. 63 ***(foll)***

Krishnankutty v. Trav. Cochin [1952] A. Tr. C. 197 ***(foll)***

B. Parraju v. Gen. Manager, B.N. Rly [1952] A. Cal. 610 ***(foll)***

State of Madhya Pradesh v. Bhailal Bhai AIR [1964] AC 1006 ***(foll)***

Dwarka Nath v. Income Tax Office AIR [1966] SC 81 ***(foll)***

Behari lal Baldeo Prasad v. Commissioner, Jhansi Division [1967] 63 ITR 555 ***(foll)***

Hindustan Steel Ltd. Rourkela v. Roy AK AIR [1970] SC 1401 ***(foll)***

Nilabati Bahera [1993] 2 SCC 504 ***(foll)***

Per Wan Yahya FCJ (dissenting):

[1] Although I would join with my respected and beloved brothers in quashing the order, I entertain serious reservations on the question of the Court's jurisdictional authority in determining the issue on consequential relief arising from the order which has been granted.

[2] The reason for granting the order, as I understand it, was due to the Industrial Court's failure to take into consideration the question of misconduct, a critical and essential issue in determining the question of wrongful dismissal. It had thus refused to take into account something which it was required by the rules of natural ustice to take into account. That is an error of law appearing plainly in the record which will had in turn affected the jurisdiction of the Court. The Federal Court is therefore concerned with the process of determination of the Industrial Court and not its factual conclusion on which the Federal Court could have no authority to intervene.

[3] In the present case if the matter is remitted to the Industrial Court for retrial such Court after considering all the issues including that which it had failed to address its mind on, may nevertheless come to the same conslusion as it had previously found, that is, the appellant was dismissed with just cause and excuse. Thus if the Court were to accept the line of reasoning that the affirmative decision of the Industrial Court can be transposed into a negative meaning it can only mean that the Court was prepared to substitute the tribunal's decision with its own finding of fact. It has to be borne in mind that the Court's supervisory jurisdiction allows the Court, the power to quash and not to act in an appellate capacity to reverse the decision of the Industrial Court.

[4] The mere order of this Court to quash the Industrial Court's findings that the appellant was dismissed with "just cause and excuse" does not *ipso facto* transform the positive findings of the Industrial Court into a negative meaning. This is so because in a *certiorari* hearing under O. 53 of the High Court Rules, this Court does not sit as an appellate Court to review and alter the findings of the Industrial Court. Our function is purely supervisory in nature and as such we possess neither the original nor appellate jurisdiction to interfere or substitute the findings of that Court with our own determination of facts.

[5] With regard to the contrasting jurisdiction envisaged under art. 226 of the Constitution of India and s. 25(2) of our Courts of Jurisdiction Act 1964, the cautious attitude of the Indian Courts in exercising the wider jurisdiction, are conflicting authorities with regard to the article itself it would seem

wholly inappropriate and unsound for this Court to grant consequential remedy to the appellant beyond those contemplated by both our written law and judicial precedents.

[6] The express procedure to be adopted in an application for certiorari, that is, to call for the records and quash the tribunal's order appear ostensibily in the face of O. 53 of the High Court Rules and the deliberate intention of the Legislature to exclude the High Court's powers to assess and award consequential relief either as damages or compensation is evident from the Rule Committee's preferred election to adopt the narrow provisions of the preamended 1977 English Rules of the Supreme Court to those of the much wider post amended rules.

[7] It is not in dispute that the Industrial Court had come to a positive decision that the appellant had been "dismissed with just cause and excuse". If that finding is to be transformed into a negative sense, that is to say, without just cause and excuse, this Court will have to review the Industrial Court's decision. Such a reversal can only be implemented by the exercise of appellate jurisdiction which the Court does not possess in a judicial review. The consequential effect in this course of action is to render the assessment and award of compensation to the appellant by the Court to be an act clearly in excess of the Court's jurisdiction.

[8] The appellant or in any event his Counsel must have been aware of the two causes of action given to the appellant i.e. to resort to the remedy by referring to the High Court under s. 33A of the Industrial Relations Act or to quash the Industrial Court's order under *certiorari*. He chose the latter and so should be satisfied with the resulting remedy obtainable from his own choice.

Cases referred to:

Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147 ***(foll)***

Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223 ***(foll)***

Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers [1991] 1 MLJ 417 ***(foll)***

Non-metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Fire Bricks Sdn. Bhd. [1976] 2 MLJ 67 ***(foll)***

Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower [1981] 2 MLJ 199 ***(foll)***

Chief Constable of the North Wales Police v. Evans [1982] 3 All ER 141 ***(foll)***

Ceylon Transport Board v. A.H. Wijeratne [1976] 1 LLJ 182 ***(dist)***

Dehli Transport Corporation DTC v. Mazdar Coagner & Ors. [1991] Supp. (1) SCC 600 SC ***(dist)***

Hoe Cheong Products Co. Ltd. v. Carqill Hong Kong Ltd. [1995] 1 WLR 404 ***(foll)***

Gujarat Steel Tubes Ltd. & Ors. v. Gujarat Steel Tubes Mazdoor Subha & Ors. [1980] 2 SCC 593 ***(refd)***
Management of City of Bangalore Municipal Corporation Employer Co-operative Society Ltd. v. E.V. Raju [1987] 1 LLJ 22 ***(refd)***
Culcutta Gas Co. v. State of WBA [1952] SC 1044 ***(refd)***
State of M.P. v. Bhailal A [1964] SC 1006 ***(refd)***
Than Singh v. Supt. of Taxes AIR [1964] SC 1419 ***(refd)***
DLF Housing Construction Ltd. v. Delhi Municipality AIR [1976] SC 386 ***(refd)***
Janardham Reddy v. State of Hyderbad AIR [1951] SC 217 ***(refd)***
Veerappa Pillai v. Raman AIR [1952] SC 192 ***(foll)***
Bhailal v. Additional Commissioner, Akola AIR [1953] Nagpur 839 ***(dist)***
The Queen v. Titterton [1895] 2 QB ***(refd)***
Sangram Singh v. Election Tribunal [1955] 2 SCR 1 ***(refd)***
Dr. A. Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***
Walsall Overseers v. L.N.W. Ry [1878] 4 App Cases 30 ***(refd)***
R. v. Northamberland Compensation Tribunal [1951] 1 KB 711 ***(refd)***
Hawkins v. Gathercole 6 D.M. & G.I. ***(refd)***
Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd. [1984] 2 MLJ 143 ***(refd)***
Dunlop Estate Bhd. v. All Malayan Estates Staff Union [1980] 1 MLJ 243 ***(dist)***
Nathan v. Barnet London Borough Council [1978] 1 WLR 220 ***(dist)***
R. v. Barnet London Borough Council, ex parte Nillish Shah [1983] 2 AC 309 ***(foll)***
Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 ***(foll)***
Regina v. Tower Hamlets London Borough Council, ex partte Chetnik Developments ***(foll)***
Regina v. Immigration Appeal Tribunal, ex parte Bakhtur Singh [1986] 1 WLR 910 ***(foll)***
Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Sri Hamzah bin Abu Samah & Ors. [1988] 1 MLJ 178 ***(foll)***
Nain Singh v. Koonwarjee AIR [1970] SC 997 ***(foll)***
Padam Sen v. State of U.P AIR [1961] SC ***(foll)***
Duport Steel Ltd & Ors v. Sirs & Ors [1980] 1 WLR 142 ***(refd)***

Per Edgar Joseph Jr. FCJ (majority decision)

[1] The provisions of the proviso to s. 25(2) of the Courts of Judicature Act do not affect the powers of the Courts; they merely control their exercise by stipulating that they shall he exercised in accordance with any written law or rules of court relating to the same. The words "in accordance with rules of Court relating to the same" mean that the procedure to make an application for prerogative orders shall be in accordance with the requirements of O. 53. There was no dispute that, in this case, there was before the High Court an application for judicial review which complied with the procedure provided by O. 53, seeking to quash the award of the Industrial Court.

[2] By s. 17(1) of the Courts of Judicature Act, powers are conferred on the Rules Committee to make "Rules of Court" for the purpose of regulating and providing the practice and procedure to be followed in the respective Courts for which each of them is constituted but within the strict limits defined by s. 17 (2). The powers do not extend into the area of substantive law.

[3] While O. 53 of the Rules of the Supreme Court can only prescribe the procedure and practice to be followed by the parties when applying for judicial review, the source of power to quash relief in judicial review proceedings is the prerogative jurisdiction inherited from the United Kingdom Courts and most importantly para 1 of the Schedule read with s. 25 of the Courts of Judicature Act. The proviso to s. 25(2) and more particularly the Rules of the High Court do not and indeed cannot narrow down or diminish or curtail the scope of the powers conferred upon our courts in judicial review proceedings.

(4) The conclusion that the employee was dismissed from service without just cause or excuse was arrived at as a result of reviewing the award of the Industrial Court not only for process but for substance. In reviewing the award for substance, the legal basis was provided by a wealth of English case law including the judgement of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*, dealing with the additional grounds of review namely illegality, irrationality and proportionality. Moreover the jurisdiction of our Courts to grant any of the prerogative orders flows not only from the prerogative jurisdiction inherited from the United Kingdom Courts but, most importantly, from the provisions of para. (1) of the Schedule read with s. 25 of the Courts of Judicature Act which confer on our Courts far wider powers than those enjoyed by the United Kingdom Courts.

[5] Paragraph 1 of the Schedule to the Courts of Judicature Act gives the additional power to "issue to any person or authority directions, orders or writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or others for the enforcement of the rights conferred by Part II of the Constitution or any of them or for any purpose". The word "enforcement" is significant from the point of view of whether the Court had jurisdiction to find that the employee had been dismissed from service without just cause or excuse and to make the consequential orders aforesaid. The High Court and the Federal Court are therefore empowered not only to quash the award of the Industrial Court but also to make a finding that the employee had been dismissed from service without just cause or excuse and to go on to make the consequential orders for fair compensation.

[6] The allegations by the employee as to the circumstances surrounding the purported termination of his services which were most material had not been contradicted by counter affidavit on behalf or the employer and are deemed to be admitted. Once these allegations were deemed admitted, there was no useful purpose in remitting the case to the Industrial Court to determine the question whether the employee's dismissal from service was for just cause or excuse. In such a case involving as it does a man's livelihood, he should not be exposed to the hazard, anxiety and delay of proceedings before a freshly constituted tribunal and thus to the risk of misapplication of the law.

(7) Order 92 r. 4 of the Rules of the High Court is a unique rule of Court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and a confirmation of the Common Law powers of the Courts, which are residuary or reserve powers and a separate, and distinct source of jurisdiction from the statutory powers of the Courts. In this country the Court of Appeal and the Federal Court have inherent jurisdiction. Supervisory jurisdiction is the creature of the Common Law and is available in the exercise of the Court's inherent powers although its extent may be determined not merely by judicial development but also by legislative intervention as for example para 1 of the Schedule read together with s. 25 of the Courts of Judicature Act.

Cases referred to:

Bradley Egg Farm Ltd. v. Clifford & Others [1943] 2 All ER 378 ***(refd)***
Collector of Land Revenue, Johore Bahru v. South Malaysia Industries Bhd. [1978] 1 MLJ 130 ***(refd)***
Minister of State for the Army v. Dalziel [1944] 68 CLR 261 ***(refd)***
R v. Dibdin [1910] p. 57 ***(refd)***
Bretherton v. United Kingdom Totalisator Co. Ltd. [1945] KB 555, 561 ***(cit)***
R v. Hillindon L.B., ex parte Puhlhofer [1986] AC 484 ***(refd)***
Edwards v. Bairstow [1956] AC 14 ***(cit)***
Din (Taj) v. Wandsworth LBC ***(refd)***
R. v. Hillindon L.B., ex parte Islam (Tafazzul) [1983] 1 AC 688 ***(refd)***
Allinson v. General Medical Council [1894] 1 QB 750 ***(refd)***
Lee v. Showmen's Guild of Great Britain [1952] QB 329 ***(refd)***
R v. Roberts [1908] 1 KB 407 ***(refd)***
R v. Bates [1982] 2 NSWLR 894 ***(refd)***
Sungei Biak Tin Mines Ltd. v. Saw Choo Theng & Anor. [1970] 2 MLJ 226 ***(refd)***
Leach v. Deputy Governor of Parkhurst Prison [1988] AC 533 ***(refd)***
R v. Deputy Governor of Camphill Prison, ex parte King [1985] QB 735 ***(cit)***
Ramarao Laxmikant Shirkhedkar v. Accountant General, Maharashtra, AIR [1963] Bom. 121 ***(refd)***
Rowjee v. State of A.P. AIR [1964] 6 SC 962 ***(refd)***
Pratap Singh v. State of A.P. A [1964] SC 72 ***(cit)***

Narayan v. State of A.P. A. [1971] SC 1713 ***(cit)***
M.P. Industries v. Income Tax Officer Nagar AIR [1970] SC 1011 ***(cit)***
Associated Provincial Picture v. Wednesbury Corp. [1948] 1 KB 223 ***(refd)***
Hoe Cheong Products Co. Ltd. and Carqill Hong Kong Ltd. [1995] 1 WLR 404 ***(dist)***
Variety Emporium v. Mohd. Ibrahim AIR [1985] AC 207 ***(foll)***
Heng Joo See v. Ho Pol Ling (Divorce Petition No. 94 of 1993) ***(cit)***
Aviagents v. Balstravest Investment [1966] 1 WLR 150 ***(cit)***
Arulpragasan a/l Sandaraju v. Public Prosecutor [1996] 4 CLJ 597 ***(cit)***
Seet Chuan Seng & Anor. v. Tee Yih Jia Food Manufacturing Pte. Ltd. [1994] 3 CLJ 7; [1994] 2 MLJ 770 ***(cit)***
Chan Chin Min & Anor. v. Lim Yok Eng [1994] 3 CLJ 792; [1994] 3 MLJ 235 ***(cit)***
Wee Choo Keong v. MBF Holdings Bhd. & ANor. [1995] 3 MLJ 549 ***(cit)***
Pengiran Osman Shah bin Pengiran Mohd. Yusof v. Karam Bunai Resort Sdn. Bhd. & 3 Ors. (Unreported, 08-31-95)
Candler v. Crane, Christmas & Co. [1951] 2 KB 164 ***(cit)***
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 17, 25(2), 67(1), 69, Schedule thereto
Courts of Judicature (Amendment) Act 1994, s. 12
Federal Court Rules 1995, r. 138
Industrial Relations Act 1967, ss. 20(1), 30(1), (3), (7), 33A(5), 33B(1), 33(4)
Interpretation Acts 1948 & 1967, s. 30
Rules of the High Court 1980, O. 52, O. 53, O. 92 r. 4
Rules of the Supreme Court 1965, O. 53 r. 6
Rules of the Supreme Court 1980, r. 51(4)
Sri Lanka Civil Procedure Code (Cap. 101), s. 753
Sri Lanka Industrial Dispute Act (Cap. 131), s. 31D
Supreme Court Act 1981 (UK), O. 53

Other sources referred to:
Principles of Administrative Law, M.P. Jain & S.N. Jain, 4th Edn. Rep. 1993, pp. 547-548
Halsbury's Laws of England, 4th Edn., Vol. 37, para. 10

For the plaintiff - V.K. Lingam; M/s. V.K. Lingam & Co.
For the respondent - C.V. Das (K. Karthigesu with him); M/s. K. Karthigesu & Co.

JUDGMENT

Eusoff Chin CJ:

On 22 March 1995 we had quashed the order of the Industrial Court with costs to the appellant here and below, and adjourned this appeal for further arguments to 1 April 1995 on consequential reliefs.

The appellant (the claimant) was first employed by the respondent (the Society) on 5 May 1986 as Trainee General Manager at a salary of RM5,500 per month

plus a car for his use. He was dismissed by the Society on 31 July 1987. After an intervention by the Registrar of Societies under Part V of the Industrial Relations Act, 1967 (the Act) he was re-employed by the Society as Credit Control and Divisional Manager effective on 1 April 1987 but with a reduced salary of RM3,950 per month plus a car.

But the claimant was again dismissed on 30 April 1988 *vide* the society's letter dated 20 April 1988 (the second dismissal). At the time of his second dismissal he was the Senior Divisional Manager (Debt Recovery and Credit Control).

The claimant made a representation to the Director-General Industrial Relations under s. 20(1) of the Act, claiming that he was dismissed by the Society without just cause or excuse, and asking that he be reinstated to his former post, failing which he should be entitled to reasonable compensation for loss of earnings, etc.

The Minister of Labour, acting under s. 20(3) of the Act referred the claimant's representation to the Industrial Court for an award.

After hearing the case, the Industrial Court made an award on 16 September 1991 *vide* Award No. 278 of. 1991 wherein the Industrial Court held that the claimant was dismissed with just cause or excuse.

The reason for the dismissal of the claimant by the Society was contained in the letter of dismissal dated 20 April 1988 and was as follows:

> Taking into account the financial and economic losses and economic recession suffered by the Society and in line with the decision of the Board of MCCS on 11 April 1988 to close the Debt Recovery and Credit Control Division, I am directed by the Board to terminate your employment as Senior Division Manager (Debt Recovery and Credit Control) with the Society by giving you three months' salary in lieu of notice in accordance with reg. 25(1) of the Society's Staff Rules and Regulations. Your last day of service shall be 30 April 1988.

The claimant in his statement of case before the Industrial Court raised the issue of bias and pleaded in paras. 2(d) and 4(a) to 4(c) as follows:

> 2(d). The claimant contends that he was a victim of partiality and vindictiveness by the CEO and the Chairman of the Society for the reasons appearing in paras. 3 and 4 of this statement.
>
> 4(a). Encik Shamsudin **had set his mind to get rid of the claimant for obvious reasons,** i.e. knowing that the claimant was not appointed as CEO he would be a threat to the position of Encik Shamsudin if the claimant was retained in the Society. He quickly succeeded in removing the claimant by having the Chairman and some directors, under his control.

4(b). The claimant's services were again terminated on 30 April 1988 within a duration of 1 year after the reinstatement in April 1987. The treatment given to the claimant a family man in his mid forties, was like a child-play. Copies of the letter written by the CEO to the claimant and the claimant's reply dated 19 February 1988 marked "RR 9" and "RR 10" respectively are annexed hereto which **exposes the predetermined mind of Encik Shamsudin to get rid of the claimant** though the matters in the letter of warning from the CEO to the claimant were simply trivial.

4(c). The claimant during the course of his duties **had discovered many abuses of the Society's funds and authority** particularly matters relating to (1) MA Pools for which Encik Shamsudin approved funds without the Board's sanction, (2) Sale of St. Michaels franchise which was signed off by the Chairman without much concern for the interests of the Society and (3) the Komart fiasco for which Mr. Mathimugam and the Board is accountable to the members. The claimant's attempts to seek explanations on these abuses were **never liked by the CEO** and the Chairman. A copy of the STAR newspaper cutting on this matter is annexed hereto and marked "RR 11". The police has since taken statement from the claimant on these matters (emphasis added)

What are the functions of the Industrial Court? We need only refer to three authorities.

In *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 at 136 Raja Azlan Shah CJM (as he then was) held:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the Court to determine whether the termination or dismissal is with or without just cause or excuse.

The same learned Judge held in *Hotel Malaya Sdn. Bhd. Anor. v. National Union of Hotel Bar and Restaurant Workers* [1982] 2 MLJ 237 at 240:

> Its functions comprise an investigation of the facts, and lastly the application of the law to those findings.

In *L. Michael and Another v. M/s. Johnson Pumps India Ltd.* [1975] 1 LLJ 262 at 268 the Supreme Court of India held:

> The tribunal has the power and, indeed the duty to X-ray the (termination) order and discover its true nature, if the object and effect, if the attendant circumstances and the **ulterior purpose** to dismiss the employee because he is an evil to be eliminated. But if the management, to cover up the inability to establish by an enquiry, illegitimately but ingeniously passes an innocent-looking order of termination simpliciter, such action is bad and is liable to be set aside.

It is clear that the claimant, had in his statement of case before the Industrial Court, raised the issue of bias, although the word 'bias' was not actually used.

The Industrial Court should have considered the following:

i) that the claimant was originally employed as Trainee General Manager at a salary of RM5,500 per month;

ii) that he was dismissed;

iii) that he was re-employed after the intervention by the Registrar of Society;

iv) that he was re-employed as a Divisional Manager with lesser salary of RM3,950 pm;

(v) that despite the lower position and lower salary the claimant did not refuse to accept the re-employment;

(vi) that the claimant had questioned the abuses and malpractices of his senior in office and that because of this the society felt that it was dangerous to have him in the society, and therefore was determined to get rid of him.

Had the Industrial Court considered these allegations, it may have come to a different conclusion as to the genuineness of the reasons given by the society for the second dismissal of the claimant's employment.

The notes of proceedings of the Industrial Court show that within one (1) month after the claimant's dismissal another executive (Shakeeb) who was junior to the claimant was appointed General Manager Business Development which was one of the functions performed by the claimant. This is *prima facie* evidence that the reasons given for the termination of the claimant's services in the Society's letter dated 20 April 1988 were not genuine and that the purported termination was *mala fide*. The Industrial Court failed to address its mind to this issue and committed one of the errors highlighted in the case of *Kesatuan Pekerja-pekerja Perusahaan Logam & Anor. v. The Honourable Minister of Labour, Malaysia* [1991] 3 CLJ 2164 at pp. 2165 and 2166, that is, "He must call his own attention to the matters he is bound to consider.'

But we find that the Industrial Court in its award did not at all address its mind to the issue of bias raised by the claimant which, in our view, is the central pillar of his case. The failure of the Industrial Court to address its mind to this fundamental issue is a serious error which affects jurisdiction and which will result in the award being quashed.

We also note that the Society in its statement in reply before the Industrial Court had raised four allegations of misconduct, and in the course of the proceedings before the Industrial Court had even raised two further allegations of misconduct against the claimant. The claimant in his written submission before the Industrial Court had dealt at length with these six allegations of misconduct. However, the Society in its reply had totally ignored

and did not at all respond to the claimant's answer to these six allegations of misconduct. The Industrial Court in its award had misdirected itself by not considering the issues raised, in particular, it had failed to determine as a fact whether the termination was as a result of a retrenchment exercise or, as a result of the claimant's misconduct.

It is trite law that a party is bound by its pleadings. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence hear the parties' arguments and finally pronounce its judgement having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil Court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider. In this case, the industrial Court had totally failed to consider the allegations of misconduct but simply concluded that because the letter of termination was grounded on retrenchment exercise, it is not bound, and therefore, not obliged to consider the issues of bias and misconduct.

For the reasons given we unanimously found that the Industrial Court had come to the wrong conclusion when it decided that the claimant was dismissed with just cause and excuse, and the award must, therefore be quashed.

The learned Counsel for the claimant, submitted that although ordinarily the Court after quashing the award of the Industrial Court would remit the case to the Industrial Court with a direction to make the necessary consequential orders, in the present case we ought ourselves to determine and make the appropriate consequential orders. We found that although the learned Counsel for the claimant was prepared to argue this point, the learned Counsel for the respondent was somewhat taken by surprise, and to enable him to prepare his arguments, we adjourned the hearing to 1 April 1995.

On the resumed hearing, the learned Counsel for the claimant submitted that the claimant is now 51 years old. He has no professional qualifications. At p. 234 of the Appeal Record, the claimant had submitted as follows, and was not denied or challenged by the Society:

> The claimant has spent his entire working life in the Co-operative movement. He worked for the Koperatif LLN for 23 years and his record of service was impeccable. He left Koperatif LLN for a challenging career with the Society. He has even taken a lower salary from RM5,500 as Trainee General Manager to the

salary of RM3,950 as Senior Divisional Manager Debt Recovery and Credit Control. Even with this lower salary the Society had treated the claimant very unjustly, and retained two retired pensioners as managers in the Society.

In para. (5) of his statement of case before the Industrial Court, the claimant had claimed reinstatement to his former position without loss of remuneration, service, seniority and benefits of any kind, failing which, to reasonable compensation for loss of earnings and loss of substantial gratuity, higher rates of Employees Provident Fund, deprivation of housing loan and other benefits etc.

The learned Counsel for the respondent submitted that, in the event of the appeal being allowed, this Court has no jurisdiction to make an order for consequential relief, and that we can only make an order remitting the case back to the Industrial Court for consequential reliefs. Learned Counsel for the claimant submitted that the claimant is now jobless, and, while the Society can certainly afford it financially to have the case remitted to the Industrial Court for consequential reliefs, the claimant could not afford to do so. Besides, if the case is remitted to the Industrial Court for consequential reliefs, it may take another six to seven years before the case can be concluded. The claimant may die first in which event his claim will have to be abandoned. He, therefore, submitted that we have the jurisdiction to order consequential relief and should not send the claimant away from the Court of justice empty handed.

The case of *Navinchandra Shakerchand Shah v. Ahmedabad Co-operative Department Stores Ltd.* [1979] 1 LLJ 60 at 77 defined the meaning of "consequential relief" as follows:

> Consequential relief is ancillary to the main relief. That is why it is called consequential. The main relief that is sought in a writ of *certiorari* is that a quasi judicial tribunal has either failed to exercise the jurisdiction vested in it or has acted in excess of it and that order has caused some harm to the petitioner and he seeks relief. The relief as the main relief that can be given to him is to quash the order but more often it is found that hardly ameliorates or improves the position of the petitioner. Therefore, consequential order has always to be made and power to grant the main relief would unless a contrary intention is somewhere expressed imply the power to grant consequential relief.

Five cases were submitted to us by the learned Counsel for the respondent in support of his argument. We have considered these cases and they are:

(1) *R v. Barnet London Borough Council Ex parte Nilish Shah* [1983] 1 AC 309 involved an issue of five immigrant students who had no right of abode in the United Kingdom and applied for an award under s. 1 of the Education Act 1962 of United Kingdom. The House of Lords ordered *certiorari* and *mandamus* and remitted the case to the local education authority.

We note that this is not a case of a workman's right to his job and livelihood which is of a fundamental importance.

(2) *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 involved a Chinese who entered Hong Kong illegally from Macau in 1967. In 1976 he was I removed to Macau but re-entered illegally shortly afterwards and remained in Hong Kong. A removal order was made against him without giving him an opportunity of making any representations as to why he should not be removed.

The principles of law involving the removal of an illegal immigrant considered in that case cannot be applied to the Industrial law cases.

(3) *Regina v. Tower Hamlets London Borough Council Ex parte Chetnik Developments Ltd.* [1988] 1 AC 858 involved the question of payment of rates under the General Rate Act 1967, and has no application to the present case.

(4) *Regina v. Immigration Appeal Tribunal Ex parte Bakhtur Singh* [1986] 1 WLR 910 involved a deportation order made by the Secretary of State against an Indian citizen. This is an immigration case which was remitted back to the Immigration Appeal Tribunal to consider the matter *de novo*.

(5) *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155 involved the dismissal of a probationary police constable under the Police Regulations 1971. At p. 1176 Lord Brightman said:

> I feel that the choice of remedy is a difficult one. It is a matter of discretion. From the point of view of the respondent who has been wronged in a matter so vital to his life, an order of mandamus is the only satisfactory remedy. I have been much tempted to suggest to your Lordships that it would be **in the circumstances a remedy proper to be granted** but it is unusual, in a case such as the present, for the Court to make an order of mandamus, and I think that in practice it might border on usurpation of the powers of the Chief Constable, which is to be avoided. With some reluctance and hesitation, I feel that the respondent will have to content himself with the less satisfactory declaration that I have outlined.

However, it must be noted that at p. 1172 Lord Brightman held:

> My Lords, I must address myself later to the question of remedy. All that I would say at this moment is that it would, to my mind, be regretable if a litigant who establishes that he has been legally wronged, and particularly in so important a matter as the pursuit of his chosen profession, **has to be sent away from a Court of justice empty-handed** save for an order for the recoupment of the expense to which he has been put in establishing a barren victory.

I noted that in this case the police constable had a remedy granted because the Counsel for the Chief Constable told their Lordships that the police constable would be offered monetary compensation and therefore there was a consequential remedy given to the police constable. He did not leave the Court empty handed with a barren victory. At p. 1175 and 1176 it was made clear that:

> Counsel for the appellant acting on instructions, told your Lordships that if the decision of your Lordships' House went in favour of the respondent it would be the intention of the North Wales Police **to offer him monetary compensation.** I trust that the compensation which the Chief Constable has in mind to offer would be on a generous scale, and amply reflect the fact that the respondent has been unlawfully deprived of his profession as a consequence of the wrongful procedures of the Chief Constable's predecessor in office.

The learned Counsel for the appellant submitted to us a bundle of authorities to support his contention that although a decision of the Industrial Court is made final by law, the High Court when exercising its supervisory jurisdiction has the power not only to quash the order made by the Industrial Court but to pass substantive orders in place of the order it has quashed or set aside. In other words, the jurisdiction of the High Court is not only confined to the narrow precints of quashing the impugned order on *certiorari* but it can also modulate its order so as to grant the appropriate relief because the jurisdiction of the High Court does not end as soon as the impugned order is quashed.

In *Gujarat Steel Tubes Ltd. v. Mazdoor Sabha* [1980] 2 SCC 593 the Supreme Court of India while quashing the order of dismissal ordered reinstatement to some workers and compensation to other workers. At p. 624 of that case the Supreme Court stated:

> While the remedy under Article 226 is extra-ordinary and is of Anglo-Saxon vintage, it is not a carbon copy of the English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy hold back the Court, the judicial power should not ordinarily rush where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action.

In *Management of City of Bangalore Municipal Corporation Employer Co-operative Society Ltd. v. E.V. Raju* [1987] l LLJ 22 the Court held:

> The next point for consideration is whether the matter has to go back to the Labour Court with a direction to appreciate the evidence on record and record its finding on the misconduct alleged against the workman. Ordinarily, I would have made a direction on these lines, but after a lapse of nearly ten years from the date of termination of the services of the workman, the interests of justice would not warrant the remand of this matter to the Labour Court.

I note that Article 226 of the Indian Constitution empowers the High Court to issue directions, orders or writs in the nature of *habeas corpus*, *mandamus*, *prohibition, quo warranto* and *certiorari* or any of them. Such directions, orders or writ may be issued for the enforcement of fundamental rights or for any other purpose.

In Malaysia, the High Courts are conferred with similar powers by para. 1 of the Schedule to the Courts of Judicature Act, 1964 which states:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, *prohibition, quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

The procedure relating to an application for *certiorari* is laid out in O. 53 of the Rules of the High Court, 1980.

I cannot find any provision in the Courts of Judicature Act, the Rules of the High Court or the Act expressly or impliedly prohibiting the High Court from granting any relief as provided for in the Act when quashing an award of the Industrial Court. The Court cannot override an express provision of the law, but if there is no express provision in the statute, then the Court can exercise its powers in a suitable case. This is precisely the approach taken by the Federal Court in *Zainal Abidin v. Century Hotel* [1982] 1 MLJ 260, where it relied upon para. 6 of the Schedule to found the *Mareva* jurisdiction.

I should go further and consider the provisions of O. 92 r. 4 of the High Court Rules, 1980 which provides:

> 4. For the removal of doubts, it is hereby declared that nothing in these rules shall be deemed to limit or affect the in powers of the High Court to make any order as may be necessary to prevent an abuse of the process of the Court.

In *Pacific Centre Sdn. Bhd. v. United Engineers (M) Bhd.* [1984] 2 MLJ 143 at 147 Edgar Joseph Jr. SCJ held:

> ... It is also clear that the inherent jurisdiction of the Court includes all the powers that are necessary "to fulfil itself as a Court of Law, to uphold, to protect and to fulfil, the judicial function of administering justice according to law in a regular, orderly and effective manner": Jacob, *The Inherent Jurisdiction of the Court* – [1970] 23 Current Law Problems, 23, 27 and 28.

In *Dunlop Estate Bhd. v. All Malayan Estates Staff Union* [1980] 1 MLJ 243 at p. 246, Mohd Azmi J (as he then was) held:

> In my view, having regard to the principles enunciated in the cases cited, the Industrial Relations Act, being a social legislation enacted with the prime object

> of attaining social justice and industrial peace, demands practical and realistic interpretation whenever necessary, for the purpose of maintaining good relationship and fair dealings between employers and workers and their trade union, and the settlement of any differences or disputes arising from their relationship.

In *Nathan v. Barnet London Borough Council* [1978] 1 WLR 220 at 228, in a case involving an industrial relations matter of unfair dismissal, Lord Denning held:

> Faced with glaring injustice, the Judges are, it is said, impotent, incapable and sterile. Not so with us in this Court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach." ... In all cases now in the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision. It is no longer necessary for the Judges to wring their hands and say: "There is nothing we can do about it." Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.

Section 33B(1) (previously s. 29(3)(a)) of the Industrial Relations Act provides that an award of the Industrial Court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court of law. Yet, our High Courts and Federal Court intervene to quash the awards of the Industrial Court in appropriate cases, all for the cause of justice. Therefore, even when the statute declares an award is final, the Courts can still intervene. (See *Sungai Wangi Estate v. Uni* [1975] l MLJ 136). Similarly, in *Minister of Labour, Malaysia v. National Union of Journalists, Malaysia* [1991] 1 MLJ 24, where the Minister has refused to refer a trade dispute to the Industrial Court under s. 26(2) of the Industrial Relations Act, the Supreme Court when upholding the decision of the High Court granting *certiorari* to quash the decision of the Minister, did not order the Minister to reconsider the matter *de novo* but instead arrogated itself the powers of the Minister and granted the relief to the workman by directing the Minister to refer the trade dispute to the Industrial Court.

It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in *certiorari* proceedings, and I find that where the particular facts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.

M.P. Jain and S.N. Jain in *Principles of Administrative Law*, Fourth Edition Reprint, 1993 at pp. 547 and 548 stated:

> In recent years the Courts have not looked upon their task in such a mechanical manner and have tended to mould their relief according to the exigency of the situation. They have tried to tailor the relief in accordance with the demands of justice in the circumstances of the specific case, lay down guidelines, go into the merits, and even at times to dilute the logical consequences of their own ruling on the law ... .
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> In a few cases the Supreme Court, while quashing a disciplinary order on account of failure of natural justice, prohibited a fresh hearing by the authority and ordered reinstatement. Recently, in *A.L. Kaira v. Project & Equipment Corporation of India Ltd.* AIR [1984] SC 1361, the Court quashed the dismissal order and ordered reinstatement ... In *Grindlays Bank v. ITO* AIR [1980] SC 656 the Court not only quashed the assessment order but also issued directions to make a fresh assessment in the circumstances of the case ... .
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> There are a number of instances where the Supreme Court has played this kind of affirmative role. In *Gujarat Steel Tubes v. Mazdoor Sabha*, AIR [1980] SC 1896, the arbitrator's award in a labour dispute having been found to be invalid as it suffered from a fundamental flaw, the Court itself proceeded to fashion the relief to be given to the discharged workers keeping in view the *dictum* that law is not *dogmatics* but *pragmatics*:. In *Azad Rickshaw Pullars Union v. Punjab* AIR [1981] SC 14, the Court itself framed a scheme so that the provisions of a statute meant for the benefit of rickshaw pullers could be made workable ...

As earlier stated, the claimant is 51 years old and has been jobless for the last seven years. Owing to his unemployment he and his family with school going children are suffering immense hardship. Should we remit this case back to the Industrial Court? To do this will certainly involve continued and prolonged litigation which will do great harm and injustice to the claimant, and were he to die, his claim will abate as was held in *Thien Tham Sang v. United States Army Medical Research Unit* [1983] 1 MLJ 97 and this will result in his family suffering grave injustice.

Employers can certainly afford to employ a number of lawyers and prolong litigation and thereby tiring out the workers. The poor workman can ill afford a lawyer or prolong litigation because this will lead to immense hardship, suffering and exorbitant expenses. In a classic judgement in *Bharat Singh v. New Delhi Tuberculosis Centre* [1986] 25 CC 614 at 619, Indian Supreme Court held:

> Instances are legend where workmen have been dragged by the employers in endless litigation with preliminary objections and other technical pleas to tire them out. A fight between a workman and his employer is often times an unequal fight. The legislature was thus aware that because of the long pendency of

disputes in tribunals and Courts, on account of the dilatory tactics adopted by the employer, workmen had suffered.

Our Parliament must have been aware of this problem and had especially enacted s. 30(3) of the Industrial Relations Act 1967 which requires the Industrial Court to make its award without delay and where practicable within 30 days. But here the claimant has been without job for seven years, and the object and spirit of the Industrial Relations Act to have industrial disputes speedily resolved in the national interests have been defeated and frustrated.

Lord Mortis of Borth-y-Gest in *Conway v. Rimmer* [1968] AC 910, held that "though precedent is an indispensable foundation upon which to decide what is the law, there may be times when a departure from precedent is in the interests of justice and the proper development of the law."

The Courts, therefore should not be obliged to continue to arrive at decisions which are both unjust to the citizens and inimical to the public well-being simply because of something decided centuries ago.

I am, therefore, of the view that based on the facts on record, this is a fit and proper case where the jurisdiction of the Court should not end with the quashing of the award.

The High Court jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of *certiorari* was developed and came to be granted by the Courts in England. Of course if the application for *certiorari* is dismissed, that ends the matter. But if the application is allowed, the Court has surely to mould the order. If we were to merely grant *certiorari* to quash the award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave injustice being caused to the claimant.

Having carefully considered the question I am not persuaded by the submission of the learned Counsel for the Society that we should remit the case to the Industrial Court with a direction to make the necessary consequential orders. As far as possible the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its attention. On the facts of the case before us, to remit this matter back to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demands that to avoid further delay and expense, we determine the consequential relief rather than remitting the case to the Industrial Court for that purpose.

As held by the Supreme Court of India in *Gujarat Steel Tubes Ltd. and Others v. Gujarat Steel Tubes Mazdoor Subha & Others* [1980] 2 SCC 593 at p. 653:

> Law may be guilty of double injustice when it is too late or too costly, for it holds out remedial hopes which peter out into sour dupes and bleeds the anaemic litigant of his little cash only to tantalise him into a system equal in form but unequal in fact.

In his statement of case the claimant had claimed reinstatement to his former position without loss of remuneration, service, seniority and benefits of any kind, failing which to reasonable compensation for loss of earnings and loss of substantial gratuity, higher rates of Employees Provident Fund (EPF) contributions and other benefits, etc.

In the context of the facts of the case before us it is not in the interest of either the Society or the claimant if we were to order reinstatement with full backwages, etc. until he retires at 60 years of age under the Society Staff Regulations. The claimant is 51 years old now, has been out of employment for seven years and has lost touch with his work. It is doubtful if he can fit in the Society where he used to work and where he was not wanted. Under the circumstances sending him back to the Society will cause him more mental distress and suffering. The appropriate remedy is to grant him compensation for loss of employment.

Before us, the learned Counsel for the claimant submitted that the claimant would be contented to claim only back wages, plus EPF contributions, and compensation for loss of employment up to age of 55 years, although under the Society's Regulations his retirement age would be 60 years, and to forego claims on loss of other benefits. I find this to be reasonable.

Prior to his second dismissal the claimant was earning a salary of RM3,950 per month on a salary scale of RM2,750 x 200 - 4,150 x 225 - 5,050. He is quite satisfied to be paid back wages without any increment. He was dismissed on 30 April 1988 and until now (31 August 1995) the period is 88 months. Loss on back wages would be RM3,950 x 88 - 347,600 less three month's salaries already paid to claimant as wages in lieu of notice which is RM3,950 x 3 - RM11,850. Back wages due to the claimant will be RM335,750. EPF contributions will have to be paid by both the Society and the claimant. The claimant was born on 10 December 1943 and would reach 55 years of age on 10 December 1998, i.e. about another 39 months. For loss of future earnings I would award him RM3,950 x 39 - RM154,050.

I would award the total sum of RM489,800 to be paid by the Society to the claimant within five months from the date of this judgment.

It follows that I would allow this appeal with costs both here and in the High Court, and the deposit of RM500 to be returned to the appellant.

I have also studied the grounds of judgment of my learned brother Edgar Joseph Jr. FCJ, and I entirely agree with him. My learned brother Wan Yahya FCJ, told me he will be writing a dissenting judgment on whether the computation of compensation to be paid to the claimant should be done by us or by the Industrial Court. He has not given me a copy of his written judgment.

Edgar Joseph Jr. FCJ:

At the conclusion of the arguments, we had unanimously allowed this appeal by R. Rama Chandran ('the Employee') with costs here and below, set aside the judgment of the High Court, quashed the award of the Industrial Court, and by a majority, concluded that he had been dismissed from service by Malaysian Co-operative Consumer Society Limited ('the Employer'), without just cause or excuse, for the reasons appearing in the judgment of the learned Chief Justice.

However, after hearing argument as to the remedies to be granted, we had reserved judgment, on an important point of law; namely, having allowed the appeal for the reasons stated, whether the extent of our powers in review jurisdiction includes the power to make consequential orders for fair compensation in favour of the Employee, instead of remitting the case to the Industrial Court to make the same, according to Law.

Before I embark upon a consideration of this question concerning consequential orders, I should like to dilate on the grounds on which we had allowed the Employee's appeal.

A perusal of the judgment of the learned Chief Justice shows that the basic ground upon which we had held that the Employee had been dismissed from service without just cause or excuse was that the act of the Employer in terminating the services of the Employee, simpliciter, by a letter dated 20 April 1988, purportedly in pursuance of a retrenchment exercise caused by "financial and economic losses and economic recession" and closure of the "Debt Recovery and Credit Control Division," to which the Employee was attached, with effect from 1 May 1988, with three months salary in lieu of notice, was really a device to cloak a colourable or *mala fide* exercise of power or, in other words, an act of victimisation, thus avoiding a fair enquiry into certain charges of misconduct, as required under the rules of natural justice. Furthermore, we were satisfied that the award of the Industrial Court was flawed on grounds of *Wednesbury* unreasonableness.

In allowing the appeal on the grounds aforesaid, it is self-evident that we had reviewed the award of the Industrial Court for **substance** as well as process. First of all, I should like to examine the **legal basis** upon which we had done so, and it is this topic which I shall now address, before I turn to consider

the question of whether we have powers to grant remedies by way of consequential orders, referred to in the second paragraph of this judgment.

It is often said that judicial review is concerned not with the decision but the decision-making process. (See, e.g. *Chief Constable of North Wales v. Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of **procedural impropriety.**

But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review makes it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinise such decisions not only for **process**, but also for **substance.**

In this context it is useful to note how Lord Diplock defined the *three* grounds of review, to wit, (i) **illegality**, (ii) **irrationality** and (iii) **procedural impropriety.** This is how he put it:

> By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of a dispute, by those persons, the Judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as *'Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v. Bairstow* [1956] AC 14, of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as **'procedural impropriety'** rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because

susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

Lord Diplock also mentioned **'proportionality'** as a possible fourth ground of review which called for development.

Lord Diplock's first ground for challenge, namely, **'illegality'**, involves insisting that the authority or body whose decision is being impugned has kept strictly within the perimeters of their powers. A good example of this is the case of *Westminster City Council v. Great Portland Estates plc*. [1985] AC 661, an *ultra vires* case, involving judicial construction of the Town and Country Planning Act 1971. The question for decision was whether the Act permitted the relevant authorities, by resort to their development plans, to support the retention of traditional industries or was the ambit of the Act such as to permit only 'land use' aims to be pursued? It was held that 'the character of the use of the land, not the particular purpose of a particular occupier' was the concern of planning and, therefore the authority could not seek to favour any particular occupant or class of occupant. By thus confining the relevant authority strictly to the four walls of the powers conferred upon them by the Act, the Court was involved in the exercise of reviewing the impugned decision for **substance** and not just **process.**

Lord Diplock's second ground for challenge, namely, **'irrationality'** recognises a different route whereby the **substance** of a decision may be reviewed by the Courts. By this means, Lord Diplock made it clear that despite being legal, that is to say within the powers conferred, a decision may nevertheless, be struck down, for being contrary to **substantive principles**. In the words of Lord Diplock, 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.

In this regard, the case of *Hall & Co. Ltd. v. Storeham-By-Sea UDC* [1964] 1 All ER 1, a planning case, affords a good illustration of how the Courts in the United Kingdom do in practice review a decision for **substance** even though it may comply with the legislative scheme. The defendant had granted the plaintiffs planning permission subject to conditions that required them to construct a road on their land and dedicate its use to the public. No compensation was payable to them for the loss of the land to be used for the road. Under Town and Country Planning law, a local authority may in granting planning permission, impose such conditions as it may think fit. The Court struck down the condition, one of the grounds being that the condition was void for unreasonableness. On the one hand, while viewed from a traffic engineering

point of view, the defendant's object was 'perfectly reasonable', but on the other hand, the course they adopted was 'utterly unreasonable'. In effect, the Court had examined the decision for **substance,** and held that the imposition of the condition was an abuse of power and unlawful. It is implicit in this decision that the Court was indirectly enforcing the fundamental civil right to be compensated adequately for property compulsorily acquired.

Lord Diplock's third ground of judicial review – **procedural impropriety** which involves reviewing a decision for **process** – requires no comment, having regard to the topic I am now addressing.

Turning to Lord Diplock's fourth ground of judicial review - namely, **proportionality** there are cases in the United Kingdom which point to the conclusion that even where EEC law is not applicable, such a principle has been recognised as a general principle of English law, and when applied, it enables the Court to review an impugned decision for **substance** as well as **process**. In this context, I have in mind cases such as *R. v. Barnesly MBC, ex parte Hook* [1976] 1 WLR 1052; *Wheeler v. Leicester City Council* [1985] AC 1054 and *London Borough of Brent, ex parte Assegai,* The Times, 18 June 1987.

In *ex parte Hook,* the suspension of a market trader's license by the Barnesley Corporation because he was guilty of a minor offence, to wit, he had urinated in the street at a time when the lavatories in the market were closed and uttered offensive words, was quashed by the Court of Appeal as being manifestly excessive. Lord Denning MR was prepared to hold, that on a further ground also, the suspension order should be quashed, namely "the punishment is altogether excessive and out of proportion to the occasion."

In *Wheeler,* the Council had refused to allow a local rugby football club to use Council owned facilities because four of its members had sporting links with South Africa. In quashing the Council's decision, with provision for declaratory relief, if necessary, in effect, compelling the Council to permit the club to use the Council owned facilities, the House of Lords held that it was unreasonable to have thus punished the club for not conforming to the Council's political attitude. In effect, the decision involved applying the principle of proportionality.

In *Assegai,* one of the grounds upon which the Council's resolutions, banning a person from all of its property, irrespective of the circumstances, on account of his unacceptable behaviour at private meeting, had been quashed was because the resolution was wholly out of proportion to the conduct complained of. Lord Justice Woolf LJ (as he then was) put the point thus:

> The banning resolution was in very wide terms and constituted reaction wholly out of proportion to what the applicant had done.

In India, in *Ranjit Thakur v. Union of India* AIR 1987 SC 2386, a case where the quantum of punishment imposed by a Court Martial was in issue Venkatchalia J speaking for the Supreme Court said this (at p. 2392):

> The doctrine of proportionality, as part of the concept of judicial review would ensure that even on an aspect which is otherwise within the exclusive province of the Court Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence should not be immune from correction.

In an interesting article entitled *'Obliging Government to Control itself: Recent Developments in Indian Administrative Law'* [1994] PL 39 Soli J. Sorabjee says that the decision in *Ranjit Thakur* 'Lays the seeds of the proportionality principal in Indian administrative law without recourse to any constitutional provision'.

In Malaysia, in *Tan Teck Seng v. Suruhanjaya Perkhidmatan Pendidikan,* [1996] 2 CLJ 771; [1996] 1 MLJ 261, an appeal arising from the dismissal of a suit by the High Court, Johor Bharu, in case concerning a headmaster of a National Type Government School, who had been dismissed from service, on the basis of a binding over order made against him, without a conviction being recorded, in respect of two offences of criminal breach of trust, in contravention of s. 409 of the Penal Code, the severity of punishment, to wit, dismissal from service, was in issue. The Johore Education Department had recommended that the applicant be demoted or reduced in rank. The language of the judgment of Sri Ram JCA, speaking for the majority in the Court of Appeal, did specifically use the term "disproportionate" when he quite correctly quashed the order of dismissal and substituted, in lieu thereof, an order that the appellant be reduced in rank and be paid all arrears of salary and other emoluments due to him.

Looking back, the picture in the United Kingdom, in recent years has been of a rapid and, at times, unpredictable expansion in the availability of the public law remedies, and rightly so. (See, *Gillick v. West Norfolk and Wisbeck Area Health Authority* [1987] AC 112; *Council of Civil Service Unions v. Minister of the Civil Service, ibid, R. v. Panel of Take Overs and Mergers, ex parte Datafin plc* [1987] QB 815, followed in Malaysia by me when speaking for the Supreme Court in *Petaling Tin Bhd. v. Lee Kian Chan & Ors.* [1994] 1 MLJ 657). And, in *Notts C.C. v. Secretary of State for the Environment* [1986] AC 240 (at p. 249) ("the rate-capping case¨), Lord Scarman said that judicial review is "not fossilised".

I would suggest that the intensity of the Court's review of administrative action may vary according to the nature of the case. The Courts in the United Kingdom have identified particular classes of cases where the exercise of power will be subject to rigorous examination. To illustrate, the interference with human rights should be subject to close scrutiny. (See, *R. v. Secretary of State for the Home Department, ex parte, Brind* [1991] I AC 696, 757).

Similarly when the result of an impugned decision may put life or liberty at risk, the duty which rests on the Court will be especially onerous. In this context, I would refer to *Bugdaycay v. Secretary of State for the Home Department London Borough Council* [1987] 1 All ER 940 (HL) where Lord Bridge stated that Courts are entitled within limits:

> To submit an administrative decision to a more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

And, Lord Templeman said this:

> Where the result of a flawed decision may imperil life or liberty a special responsibility lies on the Court in the examination of the decision-making process.

And, "life" in Article 5(1) of the Constitution, as Sri Ram JCA has said in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan* [1996] 2 AMR 1617, 1654, is wide enough to encompass the right to be engaged in lawful and gainful employment.

The categories of such cases are, of course, not closed.

I would say that in reviewing the award of the Industrial Court for **substance** and not just **process,** we were amply supported by the reasoning and the authorities cited above and, that therefore, there was **a legal basis** for us to have done so.

The next question to be addressed is whether the extent of our powers in review jurisdiction includes the power to make consequential orders in favour of the Employee instead of remitting the case to the Industrial Court to do so.

The starting point is to define judicial review. According to *Halsbury*, 4th Edn. Vol. 37 para. 567, the process of judicial review is that: "... by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior Courts, tribunals and other bodies or persons who carry

out quasi-judicial functions or who are charged with the performance of public acts and duties." *a*

Next, it is necessary to compare **appellate** review jurisdiction with **supervisory** review jurisdiction.

It is clear law that **appellate** review jurisdiction is solely a creature of statute *b* while **supervisory** review jurisdiction is the creature of the Common Law and is available in the exercise of the Courts' **inherent** power but, I would hasten to add, its extent may be determined not merely by judicial development but also by **legislative intervention**. As Abbott CJ put it, succinctly, *in R. v. Cashiobury Hundred Justices* [1823] 3 Dow Dow & Ry. 35: *c*

> (Supervisory review) always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by ... statute ... .

It is true that both **appellate** review and **supervisory** review are concerned with the correction of error but, it has often been said that they are radically *d* different processes.

Where statute provides simply for an appeal, the appellate Court has power to re-hear the whole case, and when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. Thus **appellate** jurisdiction is *e* concerned with the merits of a case.

On the other hand, very broadly stated, until Lord Diplock's enunciation of principles in *Civil Service Unions v. Minister of the Civil Service, referred* to above, **supervisory** review was mainly concerned with legality. To illustrate, *f* in *Prescott v. Birmingham Corporatio*n [1955] Ch. 210, the plaintiff, a ratepayer, had brought an action against the defendant corporation alleging *ultra vires* expenditure. The Court had struck down a scheme allowing old unemployed people to travel free of charge on the buses on the ground that this was to make a gift to a particular class and thus was *ultra vires* the *g* powers of the defendant corporation which was authorised to charge "such fares as they think fit." The Court did not determine what fares should be charged, but left it to the local authority to fix reasonable fares.

A case frequently cited in support of the proposition that judicial review is concerned not with reviewing the **merits** of a decision but the decision making *h* **process** is *Chief Constable of the North Wales Police v. Evans (ibid),* where Lord Brightman said (at p. 1173):

> Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself *i* guilty of usurping power.

a And, this is what Lord Hailsham, the presiding Law Lord in the same case said, when commenting on the purpose of the remedy of judicial review under the U.K. RSC, Ord. 53:

> This remedy, vastly increased in extent, and rendered, over a long period in recent years infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi judicial, and as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the Courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.

There are many English authorities to the same effect; for example, *Re Amin* [1983] 2 AC 818 at 829 where Lord Fraser said:

> Judicial review is entirely different from an ordinary appeal. It is made effective by the Court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative office.

Explaining why in judicial review proceedings the Court is not concerned with the factual merits of the impugned decision and, in particular, the dictum of Lord Brightman in *Chief Constable of North Wales v. Evans* (*ibid* at p. 11 74) that judicial review "is not an appeal from the decision but a review of the manner in which a decision is made", Michael Supperstone QC and James Goudie QC in their book *"Judicial Review"* have this to say (at p. 72):

> It is easy to understand why this is so. The paradigm case of a judicial review challenge arises where a body whose functions are conferred by statute are said to have acted in a manner in which the law does not allow. But if the only complaint is that the body has reached a decision unfavourable to the applicant on the facts, and the claim put forward is a plea to the Court in effect to substitute a different decision, the proceedings would amount to an invitation to the Court to exercise the very function which statute had confided to the body reviewed; to accede to such an invitation would be to usurp the will of Parliament. Since, of course, Parliament includes the elected element of the legislature, any such stance by the Court might reasonably be castigated as undemocratic ...

Nearer home, in *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour and Manpower,* [1981] 2 MLJ 199, Abdoolcader J speaking for the Federal Court, said this (at p. 202 col. 1 G and H):

> An appeal is a creature of statute and will only lie if a statute gives such a right and then only within the limits which the statute giving the right stipulates (in

re Bowman, [1932] 2 KB 621, (at p. 633 per Swift J); (*Ohene Moore v. Akesseh Tayee*, [1935] AC 72, (at p. 75 per Lord Atkin)). No appeal lies from a decision of the 1st respondent under s. 9(5). When no appeal lies from a decision, judicial review cannot be resorted to as an *alter modus* for an appeal by way of circumventing or repairing that omission. The scope of judicial review is narrower and limited ...

In *Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor.*, [1987] 1 MLJ 125, the same learned Judge, speaking for the Supreme Court, said this (at p. 127, col. 1I to col. 2B):

It is of considerable significance to bear in mind that judicial review is of the hearing and not of the decision. The House of Lords firmly restated this principle in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155, in holding that judicial review is concerned not with the decision but with the decision-making process, and that unless that restriction on the power of the Court is observed the Court will, under the guise of preventing the abuse of power, be itself guilt of usurping power. This exposition was cited with approval by Lord Fraser of Tullybelton in the House of Lords in *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] 1 AC 374 (at p. 401).

In *Hotel Equatorial (M) Sdn. Bhd. v. National Union Of Hotel, Bar & Restaurant Workers & Anor.*, [1984] 1 MLJ 363 Seah FJ, speaking for the Federal Court, said this (at p. 371 col. 1E to H):

In the exercise of its inherent supervisory jurisdiction over inferior tribunal of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise, otherwise review for jurisdictional error will be equivalent to review on merit. Speaking of the inherent supervisory jurisdiction of the superior Court or High Court, Lord Sumner in the case of *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 AC 128 said at p. 156:

> That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

The passage in the judgment of Seah FJ quoted above was cited with approval by Wan Suleiman SCJ when speaking for the Supreme Court in *Dreamland Corporation Sdn. Bhd. v. Choong Chin Sooi & Anor.*, [1988] 1 MLJ 111 (at p. 114).

A perusal of the local cases cited above shows clearly that the basic authority relied upon for the purpose of limiting the scope of judicial review, was the case of *Chief Constable of North Wales Police v. Evans (ibid)*, a case to which I must now direct attention.

In that case, a police probationer had formally resigned his office as a direct result of threat of dismissal by the Chief Constable, who had relied on a number of allegations concerning his private life which turned out to be groundless. Even if true, these allegations might not have justified his dismissal under the Police Regulations 1971. He was not given a fair opportunity to be heard and there was thus a clear breach of the rules of natural justice. The most difficult problem with which the House of Lords had to grapple was what remedy they could grant when the only relief sought was reinstatement.

The Court of Appeal had granted a declaration that the Chief Constable's decision to dismiss in default of resignation was void. The House of Lords had some misgivings about a declaration in this form because it was not clear what were the practical consequences which flowed from it, that is to say, it was unclear what the respective rights and obligations of the parties were.

Expressing regret that they could not grant an order of mandamus requiring the Chief Constable to reinstate Evans, the House instead granted a declaration that by reason of his unlawfully induced resignation, Evans had thereby become entitled to the same rights and remedies, not including reinstatement, as he would have had if the Chief Constable had unlawfully dispensed with his services under the relevant regulations. However, there was no clarification as to what these rights and remedies were.

According to Lord Brightman, the reason for not granting mandamus to reinstate Evans was that "it might border on usurpation of the powers of the Chief Constable."

Lord Bridge, on the other hand, was in favour of granting mandamus. This is what he said on the point (at p. 1165 G and H):

> There is no doubt in my mind that the respondent has suffered a grievous wrong. It should not be beyond the power of the Courts to provide a suitable remedy. The respondent has throughout disclaimed any interest in monetary compensation. What he seeks is reinstatement. This could only be secured by an order of mandamus requiring the present Chief Constable of the North Wales Police to reinstate him as a probationer constable who has already completed 14 months of his probationer service. **I have no doubt your Lordships have power to make such an order and was at one time strongly inclined to think that it should be made**. I know now that none of your Lordships favour such an order and it would therefore be an empty gesture for me to express a formal dissent on the point. (Emphasis provided)

It is interesting to note that in the Court of Appeal there are clear indications in the judgment of Lord Denning MR that in judicial review proceedings supervisory jurisdiction of the Court extends to reviewing the decision of the authority by applying a requirement of substantive fairness. Here is what Lord Denning said on this point:

I go further. **Not only must he be given a fair hearing, but the decision itself must be fair and reasonable**. That is the protection afforded to every servant who is employed under a contract of service. He is protected against unfair dismissal. No less protection should be afforded to a probationer constable. (Emphasis provided)

However, as already noted, in the House of Lords, these remarks by Lord Denning on the extent of the Court's supervisory jurisdiction were disapproved by Lords Hailsham and Brightman.

Nevertheless, it is worth noting that a number of Lord Denning's decisions have taken English Administrative law further than has generally been accepted and perhaps point the way ahead. Take for example, his willingness to review prerogative power (see *Gouriet v. U.P.O.T.W.* [1972] 2 WLR 310; *Laker Airways v. Department of Trade* [1977] QB 643), his application of the continental concept of equality of treatment (see *HTV v. Price Commission* [1976] ICR 170), his recognition of the duty to give reasons where a persons's livelihood, property and also "legitimate expectations" are at stake (see *Breen v. AEU* [1971] 2 QB 175), the substantive evidence test (see C*oleen Properties Ltd. v. Minister of Housing And Local Government* [1971] 1 WLR 433) and the requirement not only of procedural fairness but also of substantive fairness (see *Chief Constable of North Wales v. Evans*).

To recapitulate, I had at the outset observed that supervisory review jurisdiction is a creature of the Common Law and is available in the exercise of the Courts' inherent power but its extent may be determined not merely by judicial development but **also by legislative intervention**.

In this context, it is pertinent to note that the jurisdiction of the Courts in Malaysia to issue prerogative orders is derived from the prerogative jurisdiction inherited from English decisions as well as from statute. The Courts of Judicature Act 1964, by s. 25 read with para. 1 of the Schedule thereto, provides that the power of the High Court, **includes** "power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari* **or any others, for the enforcement of the rights conferred by part II of the Constitution, or any of them, or for any purpose**" (Emphasis supplied). The Schedule is entitled "Additional Powers" and this suggests powers over and above those already enjoyed by the High Court.

Part II of the Federal Constitution deals with the fundamental liberties guaranteed by Federal Constitution. And, as was correctly pointed out by Sri Ram JCA when speaking for the Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1996] 1 MLJ 481, 501: "Quite apart from being a proprietary right, the right to livelihood is one of the fundamental liberties guaranteed under Part II of the Federal Constitution."

It is obvious that para. I of the Schedule to Courts of Judicature Act 1964, is generally in *pari materia* with Article 226(l) of the Indian constitution which provides:

> Notwithstanding anything in art 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any government, within those territories, directions, orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the right conferred by part III and for any other purpose.

Part III of the Indian Constitution corresponds to Part II of our Federal Constitution which, as I have said, provides for the fundamental liberties.

There are *dicta* in a wealth of Indian case law, the effect of which is, that the powers of the High Court conferred by Article 226 are not limited to issuing prerogative writs but extends so far as to enable the Court to issue any appropriate order or direction. (See for example, J*ashingbhai v. Dist. Magistrate, Ahmedabad*, [1950] AB 363, 52 Bom. LR 544; *Ramcharan v. UP* [1953] 1 All 251, (52) AA 752; *Prabhawati Devi v. Dist. Magistrate*, [1952] AA 836; *Chhotabhai Jethabhai Patel & Co. v. Union* [1952] Nag. 156; *Amardas v. Pepsu*, [1953] Pep. 63; *Krishnankutty v. Trav. Cochin*, [1951] A. Tr. C. 197; *B. Parraju v. Gen. Manager, BN Rly*, [1952] A Cal. 61). Though these *dicta* are in the nature of general observations they cannot be disregarded out of hand.

There are also lndian Supreme Court authorities which strongly support the proposition that the power of the Courts there, in the field of public law remedies, is not limited, as in England, but much wider, so much so, that in certain circumstances, they have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. (See for example, *State of Madhya Pradesh v. Bhailal Bhai* AIR [1964] SC 1006; *Dwarka Nath v. Income Tax Officer, AIR* [1966] SC 81; *Baldeo Prasad v. Commissioner Jhansi Division* [1967] 63 ITR 555; *Hindustan Steel Ltd. Rourkela v. Roy AK* AIR [1970] SC 1401, 1407; *Variety Emporium v. Mohd Ibrahim AIR* [1985] SC 207, 210).

To interpolate, I should like to make separate reference to a recent landmark judgment of the Indian Supreme Court in *Nilabati Behera* [1993] (2) SCC 504, which shows that the reach and extent of the Court in judicial review proceedings, arising from a violation of a fundamental right, extends to the making of an award of monetary compensation against the State, **even though the Indian Constitution does not provide for the payment of damages**

or monetary compensation in such a situation, thus over-riding the principle of sovereign immunity. In so holding, the Court had laid stress on the point (at pp. 762, 763) that this remedy was 'distinct from, and in addition to, the remedy in private law for damages for the tort resulting from contravention of the fundamental right' for which a regular writ action could be commenced, in which event, as Soli J. Sorabjee has observed, in his article aforesaid, the matter may hopefully be decided after a couple of decades. What appeared to be in the forefront of the Court's mind was to ensure prompt redress by an award of monetary compensation to the aggrieved party or his family. In the picturesque phrase of the Court, to hold to the contrary would "render the Court powerless and the constitutional guarantee a mirage".

I should, perhaps, add that the importance of a litigant who has succeeded in his action for wrongful dismissal not being usually sent away empty handed was stressed by Lord Brightman in *Chief Constable of Wales v. Evans* (*ibid* at p. 1172) in these terms:

> ... it would, to my mind, be regrettable if a litigant who establishes that he has been legally wronged, and particularly in so important matter as the pursuit of his own profession, has to be sent away from a Court of justice empty-handed save for an order for the recoupment of the expense to which he has been put in establishing a barren victory.

Having regard to the breadth of the provisions of para. 1 of the Schedule of the Courts of Judicature Act 1964, it would be wrong to assume that the extent of the power of the Courts in Malaysia, in the field of public law remedies is limited in the same manner as that of the Courts in the United Kingdom, where there are no such equivalent provisions. This is a point which was not addressed in *Pahang Omnibus, Tanjong Jaga, Hotel Equatorial or Dreamland.* The need for such a wider power is illustrated by the case of *Chief Constable of Wales v. Evans* where the House of Lords was struggling to mould the remedy to suit the justice of the case. In the event, the House granted a declaration to protect the probationary constable financially for the Chief Constable's breach of the rules of natural justice.

Needles to say, if, as appears to be the case, that this wider power is enjoyed by our Courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.

For example, where policy considerations are involved in administrative decisions and Courts do not possess knowledge of the policy considerations which underlie such decisions, Courts ought not to review the reasoning of the

administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the Courts.

On the other-hand, having regard to the rapidly developing law in applications for judicial review, whenever legally permissible, we must demonstrate a willingness to mould the remedies available to suit the justice of the case.

It is within the above principles in mind that I approach the question of the appropriate remedies which should be awarded to the employee in this case.

To recapitulate, we had, in the first place, concluded that the Employee's dismissal was without just cause or excuse. As it is necessary to spell out the consequences of this conclusion so that it is clear to the parties what their respective rights and obligations are, we must go further, to consider what other reliefs should be awarded to the Employee.

Like Lord Bridge in *Chief Constable of Wales v. Evans*, (see *ibid* at p. 1165), I have no doubt that this Court has the power to grant an order of mandamus requiring the employer to reinstate the employee. However, for the reasons indicated by the Chief Justice in his judgment this will not be possible.

In order to protect the employee financially, I would therefore go on to add that by reason of his wrongful dismissal aforesaid, he has thereby become entitled to all rights and remedies, not including reinstatement, according to Law.

Next, it is necessary to spell out what these rights and remedies are.

I would say that the Employee is entitled to all moneys due to him in respect of his salary and all other emoluments, under his contract of service, as from the date of his invalid dismissal, until his retirement, had he not been wrongfully dismissed.

I have carefully considered the question whether this Court should remit the case to the Industrial Court to determine the monetary compensation to be paid by the Employer to the Employee, which will, in essence, involve a simple arithmetical calculation but will also lead to unnecessary prolongation of proceedings involving inevitable delay and increased expenditure, in what has already been a long drawn out litigation with consequent hardship to the employee, who is now getting on in age.

All the material evidence for the purpose of assessing the monetary compensation payable would appear to be before us. Indeed, there was no suggestion to the contrary, by Dr. Das, learned Counsel for the Employer.

It must be remembered that we are here concerned with an appeal which arises from judicial review proceedings whose target was an award of the Industrial Court, an inferior Court, and not an administrative decision by bodies or persons who are charged with the performance of public acts or duties. It cannot be said, therefore, that by intervening in the manner which we propose to do, we would be trespassing into the domain of the executive, thus violating the doctrine of the separation of powers, and so acting undemocratically.

In the very special circumstances of this case, to remit the case to the Industrial Court to assess the monetary compensation payable by the employer to the employee would seem to be a certain detachment from reality and, more importantly, it will not answer the needs of justice. We must, therefore, do what the Industrial Court should have done.

It follows, therefore, that for the reasons stated above, I have no quarrel with the consequential orders proposed by the learned Chief Justice and concur in their making. In doing so, I trust that we have pointed the way to new horizons in the forward march of judicial review.

Wan Yahaya FCJ:

I have had the privilege of reading the esteemed and elaborate judgment of the learned Chief Justice, the grounds of which *inter alia* deal with the two substantive and prominent issues on the subject matter of this appeal *viz*, the justification for the issuance of, and the right of the Federal Court to entertain and make consequential relief in an application for certiorari.

The factual and legal consideration leading to our order quashing the Industrial Court's award against the appellant has been meticulously dealt with in the said judgment. Perhaps it would suffice to say that the Industrial Court misdirected itself by unduly restricting its attention on the formality rather than the substance of the appellant's case. Although there were ample allegations on biasness, victimisation and previous attempts to terminate the claimants service through charges of misconduct, the Industrial Court appeared to have shut its eyes on these allegations on the premises that the employer's case was based on redundancy and that the appellant had failed to specify his allegations in more precise form in the statement of the case. In so doing the Court appeared to have lost sight of the principle issue of this case, that is, whether termination of the appellant's service was brought about by just cause. Needless to say, these issues raised were very pertinent to the appellant's case and if accepted by the Court, it would have negated the employer's claim that termination was due to redundancy.

The role of the High Court when exercising its supervisory jurisdiction on such instance as initially laid down in *Anisminic Ltd. v. Foreign Compensation*

Commission [l969] 2 AC 147 and *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 KB 223, has been explicitly spelled out in various judgments of our Courts. I need only refer to the illuminating judgment of Jemuri Sarjan SCJ (as he then was) in *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* [1991] 1 MLJ 417 at 420 & 421 wherein he dealt with both the *Anisminic* and *Wednesbury* principles and in particular to the reproduction of Lord Reed's speech during which the following words appeared:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. (Emphasis added)

In our present appeal, the failure of the Industrial Court to consider the issue raised by the appellant accounts to a serious error of fact and law which affected the jurisdiction of that Court. In that event, even if the Industrial Court appeared to be hearing an application well within its jurisdiction the error of law as revealed in the face of its record, would entitle the High Court in exercising its supervisory function to quash that order. In the words of Lord Morris of Borth-y-Gest at p. 183 in *Anisminic* case:

> If, therefore, a tribunal while within the area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or, as it is often expressed, on the face of the record) then the superior Court could correct that error unless it was forbidden to do so. It would be so forbidden if the determination was 'not to be called in question in any Court of law'. If so forbidden it could not then even hear argument which suggested that error of law had been made. It could, however, still consider whether the determination was within 'the area of the inferior jurisdiction'.

In the light of the aforementioned reasons, I fully support the first part of the Chief Justice's judgment and the order to quash the decision of the Industrial Court. Although in relation to the above issue I would join my respected and learned brothers in quashing the orders, I entertain, with respect, serious

reservations on the question of this Court's jurisdictional authority in determining the issue on consequential relief arising from the order which we have just quashed. I am thus compelled, in my unenviable predicament, to state my dissenting views.

Dato' V.K. Lingam surprised me, and from what had transpired in Court, his adversary as well when he urged this Court to proceed with the assessment of damages as consequential relief for the workman's wrongful dismissal. The wrongful dismissal I assume, is hypothesized from the Industrial Court award which states that the appellant was dismissed with 'just cause and excuse' or to put it in another way, if the appellant's dismissal was without just cause and excuse, it must have been wrongful or as Mr. Das, Counsel for the appellant so aptly described it 'there is now a vacuum, no pronouncement of any tribunal on dismissal of workman – right or wrong not established'. Even if we were to accept Dato' Lingam's inference, this is not necessarily the case, much so in our present appeal. The reason for quashing the award, as I understand it was due to the Industrial Court's failure to take into consideration the question of misconduct, a critical and essential issue in determining the question of wrongful dismissal. It had thus refused to take into account something which it was required by the rules of natural justice to take into account. That is an error of law appearing plainly in the records which had in turn affected the jurisdiction of that Court. We were therefore concerned with the process of determination of the Industrial Court and not its factual conclusion on which the Court could have no authority to interfere.

Moreover in the present case, if` the matter is remitted to the Industrial Court for retrial, that Court, after considering all the issues including that which it had failed to address its mind on, may nevertheless come to the same conclusion as it had previously found i.e. the appellant was dismissed with just cause and excuse. Thus if we were to accept the line of reasoning that the affirmative decision of the Industrial Court can be transposed into a negative meaning it can only mean that we are prepared to substitute the tribunal's decision with our own finding of fact. It has to be borne in mind that the Court's supervisory jurisdiction allows us the power to quash and not to act in an appellate capacity to reverse the decision of the Industrial Court.

Was the appellant wrongfully dismissed in this case? That is a question of fact to be determined by the Industrial Court. The mere order of this Court to quash that Court's finding that the appellant was dismissed with 'just cause and excuse' does not *ipso facto* transform the positive findings of the Industrial Court into a negative meaning.

This is so because in a *certiorari* hearing under O. 53 of High Court Rules 1980 this Court does not sit as an appellate Court to review and alter the

findings of the Industrial Court. Our function is purely supervisory in nature and as such we possess neither the original nor appellate jurisdiction to interfere or substitute the findings of that Court with our own determination of facts. The issue on this particular point of law has been dealt with in so many English and local authorities of which I need only cite a few.

Per Raja Azlan Shah FJ (as he then was) in *Non-metallic Mineral Products Manufacturing Employees Union & Ors. v. South East Asia Fire Bricks Sdn. Bhd.* [1976] 2 MLJ 67 at 68:

> The circumstances under which the High Court can interfere with the decision of the Industrial Court are limited. For instance, it has no jurisdiction under s. 25 of the Courts of Judicature Act to interfere with the findings of fact reached by the Industrial Court on the ground that the decision is erroneous except where there is a clear error of law on the face of the record. It cannot arrogate the powers of a Court of Appeal by substituting its own judgment for that of the Industrial Court on question of fact and cannot review the evidence.

Per Abdoolcader J (as he was then was) in *Pahang South Union Omnibus Co. Bhd. v. Minister of Labour & Manpower* [1981] 2 MLJ 199 at 202:

> Neither the learned Judge nor this Court is sitting on appeal against the decision of the lst respondent. An appeal is the creature of statute and will only lie if a statute gives such a right and then only within the limits which the statute giving the right stipulates (In *re Bowman* [1932] 2 KB 621, 623 (at p. 633 per Swift J.); (*Ohene Moore v. Akesseh Tayee* [1935] AC 72, 75 at p. 75 per Lord Atkin). No appeal lies from a decision of the lst respondent under s. 9(5). When no appeal lies from a decision, judicial review cannot be resorted to as an *alter modus* for an appeal by way of circumventing or repairing that omission.

In *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* (*supra*) Jermuri Serjan SCJ (as he then was) meticulously referred the *dictum* of various English Judges as quoted in the *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 in particular at p. 420 of the judgment in *Harpers* case where the following appear:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the Court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

and at p. 421:

> Where the question of jurisdiction turns solely on a disputed point of law it is obviously convenient that the Court should determine it then and there. But where the dispute turns on a question of fact, about which there is a conflict of evidence, the Court will generally decline to interfere.

and in the same page the learned SCJ said:

> On the authorities quoted above it is not the function of the High Court in exercise of its supervisory jurisdiction to hear a dispute *'de novo'* and decide it on its merits.

This aspect of the Court's supervisory jurisdiction has been dealt with in the House of Lords' case of *Anisminic v. Foreign Compensation Commission (HL)* [1969] 2 AC 147. At p. 182, Lord Morris of Borth-y-Gest expressed it in these words:

> The control which is exercised by the High Court over inferior tribunals (a categorising but not a derogatory description) is of a supervisory but not of an appellate nature. It enables the High Court to correct errors of law if they are revealed on the face of the record. The control cannot, however, be exercised if there is some provision (such as 'no *certiorari*' clause) which prohibits removal of the High Court. But it is well settled that even such a clause is of no avail if the inferior tribunal acts without jurisdiction or exceeds the limit of its jurisdiction.
>
> In all cases similar to the present one it becomes necessary therefore, to ascertain what was the question submitted for the determination of a tribunal. What were its terms of reference? What was its remit? What were the questions left to it or sent to it for its decision? What were the limits of its duties and powers? Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or not the conditions precedent were satisfied? If Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists. The decided cases illustrate the infinite variety of the situations which may exist and the variations of statutory wording which have called for consideration. Most of the cases depend, therefore, upon an examination of their own particular facts and of particular sets of words. It is, however, abundantly clear that questions of law as well as of fact can be remitted for the determination of a tribunal.
>
> If a tribunal while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the Court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a Court of law. If a particular issue is left to a tribunal to decide, then even where it is shown, (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if an error of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction. If issues of law as well as of fact are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called in question in any Court of law.

At p. 194 of the same judgment, Lord Pearce sums up the jurisdiction of the Courts over inferior tribunal's judgment as follows:

> From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the Courts. When this happens the Courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal ...
>
> ... The Courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review.

And at the bottom of the same page, his Lordship specified the circumstances in which the Courts might exercise its powers as follows:

> Thus a historical survey of the ancient remedies by which the Courts have exercised their supervisory jurisdiction by prerogative writs is not very helpful. By writ of *certiorari* they have called the decision of an inferior tribunal into the Court of the King's Bench Division and examined it and quashed it if it is due to an error of law which can be seen on the face of the record. And, having quashed, the Courts can by writ of mandamus direct the tribunal to do its duty according to law, or by writ of prohibition forbid the tribunal to do that which is not in accordance with the law.

The cited authorities appear to lead to the common dictum that the Court's power to interfere with the tribunal's finding is supervisory as opposed to appellate or original in nature and such power can only be discharged by quashing the inferior tribunal's order, and, in United Kingdom where the application is joined by mandamus, by an order directing the tribunal to carry out its function in accordance with the law.

Dato' Lingam, however, told us that our jurisdiction to deal with consequential relief though normally confined to the jurisdiction of Industrial Court, could in certain circumstances be exercised by this Court. He invited us to adopt the decision of several Sri Lanka cases, in particular the Sri Lankan Supreme Court cases of *Ceylon Transport Board v. A.H. Wijeratne* [1976] 1 LLJ 182 and *Dehli Transport Corporation DTC v. Mazdar Coagner & Others* [1991] Supp (1) SCC 600 SC but as pointed out by Mr. C.V Das, Counsel for the respondent, these cases have been decided on the laws of Sri Lanka which differ constitutionally and procedurally from our laws. Section 31D of the Sri Lanka Industrial Dispute Act (Cap. 131) reads:

> 31D. (1) Save as provided in sub-s. (2) an order of a labour tribunal shall be final and shall not be called in question in any Court.
>
> (2) Where the workman who, or the trade union which, makes an application to a labour tribunal or the employer to whom the application relates is dissatisfied with the order of the tribunal on that application, such workman, trade union or employer may, by written petition in which the other party

> is mentioned as the respondent, appeal to the Supreme Court from that order on a question of law.

Thus it would appear from the above provisions that in Sri Lanka, the Supreme Court and not the High Court is the ensuing or eventual venue for hearing any application against the decision by labour tribunal and it does so by way of an appeal. These cases went on appeal on grounds of law regarding the application of wrong principle of compensation. In such an event, the Supreme Court has full appellate jurisdiction and it can deal with all the questions and award relief as could have been originally granted by the tribunal. A corresponding remedy could have been obtained in our High Court by reference under s. 33A(5) of our Industrial Relations Act 1967 had the workman been mindful to do so but he had instead opted to proceed under O. 52 of High Court Rules and as such it is only fair that he should abide by the remedy available under his *certiorari* application.

It is also interesting to note that the Supreme Court in Sri Lanka is empowered to exercise revisionary powers and, unlike their counterpart in Malaysia, to enjoy the freedom of substituting its own views on the merits as found by an inferior Court. That intention is manifested in s. 753 of the Sri Lanka Civil Procedure Code (Cap. 101) which reads:

> The Supreme Court may call for and examine the record of any case, whether already tried or pending trial, in any Court, for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such Court, and may upon revision of the case so brought before it pass any judgment or make any order which it might have made had the case been brought before it in due course of appeal instead of by way of revision.

Reverting to the Sri Lanka cases as cited by Dato' Lingam, it is obvious to me that they were decided on the basis of an entirely different jurisdictional and procedural laws and therefore cannot be adopted as an appropriate legal procedure to be applied in our present case.

As the logic of the appellant's arguments appear to pivot substantially on these Sri Lanka authorities, and as an adjunct, on O. 92 of the Rules of High Court 1980, Counsel's argument must stand or fall with the relevancy and applicability of those cases to our present appeal. On my part I have already decided against their compatibility with our Malaysian laws and I believe that also happens to be the view taken by the other learned members of this panel for none of these Sri Lankan cases have been adverted to nor mentioned in the Chief Justice's judgment.

However, the majority view of my learned brothers is that the appellant's case can nevertheless succeed on the basis of an analogy between the power conferred by Indian Constitution and our s. 25(2) of the Courts of Judicature Act 1964. This line of reasoning unfortunately was never raised as an argument in this Court nor in the Court below. I am thus confronted with the principle to be appied when a Court and particularly a Court of appeal, as in the present case, relies in arriving at its decision, on an issue which has never been raised or argued by either party at the hearing before that Court. I have in mind the Privy Council case of *Hoe Cheong Products Co. Ltd. and Cargill Hong Kong Ltd.* [1995] 1 WLR 404.

In that case Hoe Cheong Products Co. Ltd. (the sellers) agreed to sell 10,000 tonnes of cotton to Cargill Hong Kong Ltd. (the buyers). The contract of sale contained a *force majeure* clause to this effect:

> Should (the sellers) fail to deliver the contracted goods or effect the shipment in time by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control, the time of shipment might be duly extended, or alternatively a part/whole of the contract might be cancelled, but (the sellers have) to furnish (the buyers) with a certificate issued by China Council for the Promotion of International Trade ('C.C.P.I.T.') or an independent and competent Chinese authority attesting such event or events.

The sellers could not deliver the whole quantity as contracted and the buyers sued them. At the hearing before the High Court, the sellers sued *inter alia* on the *force majeure* clause. The buyers contested the clause on substantially three grounds *viz* that the contract did not stipulate that the cotton should originate from Henan and accordingly a certificate referring to the draught in that State did not entitle the sellers to rely on the *force majeure* clause; the certificate was not genuine and that such certificate was not delivered to them.

The High Court Judge held in favour of the sellers on all the three grounds. The Court of Appeal in Hong Kong upheld all the three grounds as found by the High Court but the appellate Court additionally held, without the issue being raised or argued by either party, that at the time of entering into the contract, the sellers were aware of the risk that the buyers would not receive the goods due to the *force maleure* and that in such circumstances, the clause was ineffective.

On appeal Lord Mustill, when delivering the judgment of the Privy Council, dealt with this issue in the following passage:

> The sellers now contend that this procedure was impermissible, and that the decision of the Court of Appeal of Hong Kong on the new question cannot be allowed to stand. Their Lordships must agree. The principles which inhibit the

parties from raising new points on appeal, particularly where the facts have not been investigated at the trial, are so well established that it is unnecessary to quote from authorities such as *Tasmania (Owners of) v. City of Corinth (Owners of)* [1890] 15 App. Cas. 223, *Connecticut Fire Insurance Co. v. Kavanagh* [1892] AC 473 and *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] AC 218. These principles apply equally where it is the Court, rather than the parties, which seeks to introduce the new legal issue. If in the present case the matter had been ventilated in open Court it would, their Lordships believe, soon have become apparent that there had been insufficient exploration of the facts at the trial to permit the application of whatever law might have emerged from an examination of the authorities. In the event, however, even this modest examination did not take place. The point appears to have been an afterthought. It does, of course, happen from time to time that a Court comes to learn of a statute or authority bearing importantly on an issue canvassed in argument but, through an oversight, not then brought forward. The Court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them. The present case required even more meticulous procedures, for what the Court introduced was not new material on the existing issue but an entirely new question of law and fact. The occasions when an appellate Court would find it proper even to contemplate such a course after the conclusion of the arguments must be rare, but if it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all. If this had happened here, the sellers should have had little difficulty in showing that the case had proceeded too far to enable the question to be taken into account. The judgment would then have proceeded on the basis of the issues which had been in existence throughout, although the Court could, if it had wished, have kept the point open for consideration in some future case by emphasising that it had not been argued and did not form part of the decision. In the event, however, none of this happened. The course taken deprived the sellers not only of the opportunity to argue the point on the merits. (which in itself would have required the Board to set aside this part of the judgment) but also of an unanswerable objection on procedural grounds. With the best of intentions, the Court of Appeal of Hong Kong acted in a way which was unfair to the sellers. The new issue should not have formed a ground for the decision under appeal, and their Lordships propose to say nothing more about it.

In regard to this point, I would with respect adopt the view taken by their lordships of the Privy Council that where a new or additional question of law is to be considered by any appellate Court after the conclusion of the arguments, it must explore by adversarial means not only as to the merit of the new or additional question but also the propriety of entering into it at all. The injustice arising from adjudicating on an argument not raised by a party (in our case, both parties) is not confined to procedural unfairness alone but

is tantamount to a denial of the parties right to be heard on a critical and indeed the decisive issue.

It is therefore my humble and respectful opinion that the argument expressed by my learned brother on Art. 226 of the Indian Constitution should not be considered as forming part of the respondent's case at all. In the absence of this argument, the appellant could only rely on his subsidiary ground on the inherent powers of the Court.

Notwithstanding the above reasoning, I should perhaps proceed to state my views on Art. 226 of the Indian Constitution.

In the learned Chief Justice's judgment it was rationalised that the High Courts and Supreme Courts in India derived the power to grant consequential relief in certiorari cases by virtue of Art. 226 of the Constitution of India which was stated to be similar to the provision on additional power conferred on our High Courts as spelled out in para. 1 of the Schedule to the Court of Judicature Act 1964. Thus it was held that our Courts too would possess similar power to grant such relief. *Gujrat Steel Tube Ltd. v. Mazdoor Sabha* [1980] 2 SCC 593 and *Management of City of Banglore Municipal Employee Co-operative Society Ltd. v. E.V. Raju* [1987] 1 LLJ 22 were cited as authorities.

Perhaps it would be convenient at this stage to take a look at the relative provisions of the relevant laws:

Article 226 of the Constitution of India

(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person *or* authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by part III and for any other purpose. (Highlighted for comparison)

(2) The power conferred by cl. (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(3) Where any party against whom an interim order, whether by way of induction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under cl. (1), without:

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order, and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the Counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by cl. (2) of Art. 32.

Section 25 Courts of Judicature Act 1964.

(1) Without prejudice to the generality of Art. 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of sub-s. (1) the High Court shall have the additional powers set out in the schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating to the same.

Para. 1 to the schedule of the Courts of Judicature Act 1964.

Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari,* or any others, for the enforcement of the rights conferred by part II of the Constitution, or any of them or for any purpose.

I would agree that there is similarity in the language of that part of Art. 226(1) on jurisdiction to issue writs etc, with the Schedule, and that Part III of the Indian Constitution deals with fundamental rights as in Part II of our Constitution. However on proper reading of the two provisions I am inclined to the view that the jurisdictional authority conferred by the two laws differ substantially in their application.

Article 226 confers vast and wider powers to the Supreme and High Courts in India than s. 25 of the Courts of Judicature Act 1964 does to our Courts. Read with Art. 32 of the Constitution of India, the Supreme and High Courts

there are empowered to hear directly as original jurisdiction any application where the issue is on the infringement of the fundamental right of the subject.

Under Art. 226 and 32, the powers of the High Courts in India are not limited to the issuance of writs in the nature of the English prerogative writs alone but the Court could also give directions requiring affirmative action or positive activity whereas in the corresponding English writ the Court could only set aside the order complained of see – *Culcutta Gas Co. v. State of W.B.A.* [1952] SC 1044.

Indeed, under Art. 226 the High Courts in India can give consequential relief – see *State of M.P. v. Bhailal A.* [1964] SC 1006.

Having regard to the vast and almost unlimited powers of Art. 226, the question to be answered is whether our Courts are entitled on the basis of minor similarity of the language in one of the Articles alone to import into our Courts of Judicature Act the jurisdiction envisaged in that Article. I am not in favour of such an interpretation for the following considerations:

(i) Article 226 is part of the Constitution of India i.e. the supreme law of that country. Being a provision entrenched in the Constitution the powers therein, including the power to issue the writ of *certiorari*, cannot be taken away or in any manner modified, other than by an amendment to the Constitution itself. Hence any law which tends to take away or restrict the jurisdiction of the Court under Art. 226 must be held to be void and so the Courts in India are entitled to exercise the powers under that article free from any fetters imposed directly or indirectly. In contrast, our Court's power to issue *certiorari* is contained in an ordinary Act of Parliament and therefore it can be qualified or modified by another Act of Parliament. Particularly in our case is our Rules of High Court 1980.

(ii) The powers under Art. 226 include not only the power to issue writs in the nature of English prerogative writs but also the power to issue directions and orders for the enforcement thereof. The powers are exerciseable even against the Government or any public official acting on behalf of the Government. The position in England is otherwise. Mandamus does not issue to the crown or any public servant acting for the crown. Thus the power under the Article is much wider and part of which are outside the ambit of the English prerogative writs. As our *certiorari* laws are similarly modelled as the pre 1977 amendment of the English Rules of the Supreme Court hence the power to grant consequential relief under the Article is likewise outside the scope of our High Court Rules.

(iii) Despite the vast powers conferred by Art. 226, the Courts in India have always exercised these powers with self restraint or self imposed limitations

so as not to impede the public administration of that country. Thus the large power conferred on the Supreme Court and High Court under Art. 32 and Art. 226 are exercised in accordance with well established principles. For instance when exercising its discretionary jurisdiction under this Article, the High Court should not act as a Court of Appeal or revision in order to rectify mere errors on facts. The Article was not intended for use to obtain alternative remedy which could be obtained by a suit or other statutory remedy. When it is open to the aggrieved person to obtain from a tribunal set up for a specific purpose or as provided in a statute, the Courts will not entertain the application, if by doing so it would by pass the machinery specially created by statute to determine such a dispute. Likewise the Courts in India will not enter into determination of questions which require elaborate examination of evidence – *Thansingh v. Superintendant. of Taxes* AIR [1964] SC 1419 at 1423(7), and in *DLF Housing Construction Ltd. v. Delhi Municipality* AIR [1976] SC 386 at 392 Goswami J expressed it as follows:

> In our opinion, in a case where the basic facts are disputed, and complicated questions of law and fact depending on evidence are involved the writ Court is not the proper forum for seeking relief. The right course of the High Court to follow was to dismiss the writ petition on this preliminary ground, without entering upon the merits of the case. In the absence of firm and adequate factual foundation, it was hazardous to embark upon a determination of the points involved. On this short ground while setting aside the findings of the High Court, we would dismiss both the writ petition and the appeal with costs. The appellants may if so advised, seek their remedy by a regular suit.

Although Art. 226 is a much wider provision than the corresponding power of English prerogative writs the Courts in India have adopted the nomenclature of the English writs and so the English law has been applied in application made under the Article. In *Carlsbad Mineral Water Manufacturing Co. v. Jagtiani* AIR [1952] Cal. 315 the High Court observed:

> At first sight it would appear that the language used in Art. 226 imposses no limits whatsoever as to the category of persons to whom, and the purpose for which orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari* or any of them, may be issued by the High Court. But once the origin and history of high prerogative writs are remembered it is clear that the powers given to a High Court under Art. 226 are to be exercised in accordance with the principles which governed the said writs. The power of the High Court to issue such a writ 'to any person' can only mean the power to issue such a writ to any person to whom according to well-established principles a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words 'and for any other purpose' must mean 'for any other purpose for which any of the writs mentioned would according to well established principle issue'.

So was it in *Janardham Reddy v. State of Hyderbad* AIR [1951] SC 217 where the Supreme Court observed:

> The power given to this Court under the provision is a large one but it must be exercised in accordance with well established principles.

Hence the principles of English law are applicable to issue of writs under Art. 226 to the extent that they do not conflict with the provisions of the Constitution of India.

(iv) The existence of alternative remedy and the exercise of discretionary relief are matters seriously considered by the Indian High Court in granting relief under Art. 226. In a *certiorari* case the right to a rehearing and assessment of compensation by a specialised tribunal is a statutory alternative remedy.

Thus in the case of *Veluswami v. Raja A.* [1959] SC 422 the Court observed:

> The jurisdiction of the High Court to issue the writs against orders of the tribunal is undoubted; but then it is well settled that where there is another remedy provided, the Court may properly exercise its discretion in refusing to interfere under Art. 226.

Likewise, where the case involves the exercise of discretion by a tribunal entrusted to do so by the law, the Supreme and High Courts cannot arrogate that discretion and on their own pass an order on the merits. This was the rationale laid down by the Supreme Court of India in *Veerappa Pillai v. Raman* AIR [1952] SC 192 during which Chandrasekhara Aiyar J said:

> Such writs as are referred to in Art. 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them., or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness or the decisions impugned and decide what is the proper view to be taken or the order to be made.
>
> Further, it will be noticed that the High Court here did not content itself with merely quashing the proceedings, it went further and directed the Regional Transport Authority, Tanjore, 'to grant to the petitioner permits in respect of the five buses in respect of which a joint application was made originally by the petitioner and Balasubramania Pillai and that in case the above buses have been condemned, the petitioner shall be at liberty to provide substitutes within such times as may be prescribed by the authorities'. Such a direction was clearly in excess of its powers and jurisdiction.

Although the decision in *Veerappa's* case had been distinguished in *Bhailal v. Commissioner, Akola* AIR [1953] Nagpur 839 the distinguishing question is confined to the right of the High Court to issue direction to the Rent Control Authority to grant permission to the petitioner to determine the tenancy. The Nagpur case is therefore not an authority to sanction the Courts into assuming the role of a fact finder and to make orders on the merits of its own findings.

Although the High and Supreme Courts in India have the jurisdiction to grant consequential relief, these Courts have very rarely exercised those powers. The *Gugrat Steel* case is an exceptional case involving several hundred people in an industrial dispute of a steel mill and which require exigent solution for obvious economic reasons. The precept of referring to judgments based on foreign Constitution or Acts of Parliament is to be resorted to with greatest caution. Even in construing Act of Parliament within the same State such a course should only be taken where there is ambiguity. In *The Oueen v. Titterton* [1895] 2 QB Lord Russell CJ said:

> But Sutton has referred us to two cases as authorities in support of his contention that s. 41 of the Act of 1839 is still unrepealed, and holds good in such a case as the present. With regard to those cases I may observe that the language of Lord Campbell CJ in one of them. *(Wray v. Ellis)* l E & E at p. 288, where he says that 'there can be little use in referring to cases where a similar question has arisen on Acts of Parliament differently framed, for they only illustrate the general principle which is not in dispute,' seems most apposite to the present discussion. The duty of the Court when called upon to construe an Act of Parliament is, I conceive, to read the Act itself, and if its language is clear to give effect to what the legislature has said. It is to my mind proper to refer to earlier Acts in *pari materia* only where there is ambiguity. And I can see no ambiguity here.

In our present case the original orders prayed for was for a reinstatement. Reinstatement is a primary remedy involving the exercise of discretion and discretion must be exercised along recognised lines. Thus in judgment of *Sangram Singh v. Election Tribunal* [1955] 2 SCR 1, it was stated:

> The High Courts do not, and should not, act as Courts of appeal under Art. 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensued. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of cases.

The discretion as to whether to award compensation in lieu of reinstatement is an issue to be decided by the Industrial Court see – *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at 313 where Chang Min Tat who delivered the judgment of the Federal Court said:

> With all respect, this interpretation clearly flies in the teeth of the plain provisions of sub-ss. (1), (5) and (6). It ignores the jurisdiction given to the Court (Semble – Industrial Court) to make an award 'relating to all or any of the issues in dispute.' The right to compensation must be an issue in representations for reinstatement and necessarily arises where the Court would not order reinstatement. And this is apart from the duty of the Court to act according to 'equity, good conscience, and the substantial merits of the case without regard to technicalities and legal form.' 'The Court shall not be restricted to the specific relief claimed' must, in the case of representations for reinstatement under s. 20(l), which we have observed is the logical claim to be made by the workman, mean an award not only in addition to the order for reinstatement, but also in compensation for the reinstatement that the Court would not award. Confirmation for this interpretation can be found in the subsequent words 'may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling ... the reference to it under s. 20(3).' We cannot understand how in a reference under s. 20(3) an 'award' that orders neither reinstatement nor compensation where the dismissal is without just cause or excuse, can be said to be in accordance with the guidelines in sub-ss. (1), (5) and (6) or settle the reference.

The determination on reinstatement or compensation is an issue of fact which may require technical knowledge, the exercise of administrative experience and discretion. Often it involves various considerations of the workman's background, his relationship with his employer, the suitability of reinstating him in his former office and many intricate facts relating to his employment. In assuming his pecuniary loss brought about by the dismissal, it would be necessary for the Industrial Court to decide on the evidence rather than on affidavit alone. The Federal Court, in our present case, would be performing its original and appellate but not its supervisory jurisdiction if we were to proceed to determine the issues on the appellant's compensation in lieu of reinstatement. Having regard to the contrasting nature of jurisdiction envisaged under Art. 226 of the Constitution of India and s. 25(2) of our Courts of Judicature Act 1964, the cautious attitude of the Indian Courts in exercising the wider jurisdiction, the conflicting authorities with regard to the Article itself and the various factors that have been discussed in paras. (i) to (v) above, it would seem judicially inappropriate and unsound for this Court to grant consequential remedy to the appellant beyond those contemplated by both our written law and judicial precedents.

Over and above these factors, it is my considered opinion that our s. 25 of the Act being a mere creature of statute and not being part of the Federal Constitution is subject to qualification and modification by other legislation. Section 25(2) must be read with O. 53 of the Rules of High Court 1980 and when so read the powers under the Act do not seem to be unlimited.

As can be seen from the Act reproduced earlier, that the power to issue the writ in the nature of the English prerogative writs is derived from s. 25(2) of the Act. The authority conferred by that sub-section however must be read subject to the proviso following:

> Provided that all such powers shall be exercised in **accordance with any written law or rules of Court** relating to the same (highlighted for emphasis).

It is patently obvious from the above that the legislature has not only restricted the powers under s. 25(2) to be exercised in conformity with any other existing legislation but it has also seen fit to specify the rules of Court as being the law to which the proviso also applies.

The particular rule of Court applicable in this instance is O. 53 of the Rules of High Court 1980. Under this order *certiorari* may be issued to remove the record of the proceedings from an inferior Court or administrative tribunal or other public authority to the High Court to be quashed. Under the preamended English O. 53 which is identical to our O. 53, there is no power to amend the proceeding – see *Walsall Overseers v. L.N.W. Ry* [1878] 4 App. Cases 30 but there is power to quash and order retrial *R. v. Northamberland Compensation Tribunal* [1951] a KB7 11. The inescapable inference from this reasoning leads us to the conclusion that the power of review under *certiorari* must be exercised in conformity with the provision of O. 53 and when so applied the power to issue *certiorari* is confined only to the quashing of the order or remitting it to the inferior Court or tribunal for retrial. Consequently as the powers of our High Court are confined to quashing the inferior Court's order and sending it back for retrial, the Court cannot embark on the exercise for the determination of consequential remedies neither can the Indian authorities based on the wider and positive provisions of their constitution be relied on to extend the jurisdiction of our Courts beyond what was contemplated by our legislature.

That intention becomes apparent when one looks at the state of the relevant order prior to and after the coming into effect of both the Malaysian and English Rules of Court.

In 1977 the Rules of Supreme Court of England were amended to provide changes in the substance of the procedural law. Reliefs by way of *mandamus, prohibition, certiorari, declaration* and *injunction* have been consolidated

under the generic caption of 'Judicial Review'. An applicant under this amended order can claim any or all of these reliefs in the alternative or in addition to other reliefs arising out of the same matter. Under this amended order the Courts in England are empowered to award damages – see O. 53 r. 7 SCP 199 p. 845 and also *the guide to commentary on judicial review* 53/1 - 14/23. As a result of the amendment, an applicant would not fail on any of the technical grounds in case he had asked for the wrong writ and he has the added advantage of claiming relief by way of declaration or injunction.

However, when our Rules of High Court was made in 1980, the startling departure from the common law made by the said 1977 amendment was not adopted in Malaysia in our Rules of the High Court, 1980. The Rules Committee instead opted for the preamended order of the English Rules of the Supreme Court 1965 with necessary modification but otherwise reproduced substantially word for word O. 53 r. 6 of the English rules corresponding to O. 53 r. 5 which now reads:

> 5. (1) In the case of an application for an order *certiorari* to remove any proceedings **for the purpose of their being quashed**, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion or summons he has served a copy thereof verified by affidavit on the Attorney General, or accounts for his failure to do so to the satisfaction of the Court or Judge hearing the motion or summons.
>
> (2) Where an order of *certiorari* is made in any such case the order shall direct that the proceedings **shall be** quashed forthwith on their removal to the High Court. (Highlighted for emphasis).

Thus, the power under our O. 53 remain the same as it were in the English pre amended order, that is *certiorari* is intended for the quashing of the lower Court's or tribunal's proceedings and in appropriate cases to order a retrial, and nothing more.

It is patently conspicuous that the Committee has deliberately left out the power set out under O. 53 r. 7 of the English post 1977 order on damages or compensation as well as the alternative or additional relief as contained in that order entitled 'Application For Judicial Review' and therefore by doing so had manifested its intention that the supervisory jurisdiction of our High Court to prevent injustice in cases involving error of law on the face of the records, be confined to the calling up of the records and quashing the erroneous order of that Court. If the Rules Committee had thought otherwise, there could have been nothing easier for them than to reproduce r. 7 of post 1977 English order to give effect to consequential relief such as damages or compensation.

It might be suggested that the Rules Committee had overlooked this provision when they drew up the 1980 Rules, but such a thought would be clearly unsustainable when one proceeds to consider that the Rules Committee under s. 17 of the Courts of Judicature Act 1964 consists of no lesser personalities than the Lord President, the two Chief Justices of the High Courts (as they were then known), Judges of the Federal and High Courts, the Attorney General, nominees of the Bar Council and prominent advocates and solicitors.

It would be preposterous to even think that they were being neglectful or unaware of the position of the English law which is contained in the white book and to which almost every member of the Judiciary and the Bar makes constant reference.

To my mind, the omission to adopt r. 7 of the post 1977 English rules was done with a deliberate design to exclude our Courts from indulging in the deliberation on consequential relief and thereby shut the flood gates to a new category of original or appellate jurisdiction on a judicial review.

In the words of Turner LJ in *Hawkins v. Gathercole 6 D.M. & G.I*:

> The dominant purpose in construing a statute is to ascertain the intent of the legislature, and this may be done in any one of three ways. First, by considering the cause and necessity of the Act. Secondly, by comparing one part of the Act with another and thirdly (and this is the most indefinite) sometimes by foreign (meaning extraneous) aids "so far as they can justly be considered to throw light upon the subject".

The intention of our legislature is manifest from the wordings of s. 25 and our Rules of High Court and also by comparison with the pre and post 1977 English rules, that is, our O. 53 is meant for quashing the lower Court's or tribunal's order only and not for the Court to take upon itself the original jurisdiction of deliberating on questions of reinstatement, damages or compensation.

For that reason none of the *certiorari* cases on the 1977 preamended English law could have possibly allowed any additional claim for damages or compensation. The rule that a claim for *certiorari* could not be coupled with a claim for damages is so elementary that only one text book out of a number of those on similar subject took the trouble to mention that no claim for damages could be made in an application of *certiorari* – see Hood Phillips Constitutional and Administration Law 7th Edn. [1987].

Even after the amendment of the English O. 53 there appears to be no decided cases where the High Court has gone into detailed computation of compensation. The indisposition of the English Courts towards deliberating on

the question of consequential remedy in judicial review is discernible from the following judgment of Lord Brightman in *Chief Constable of the North Wales Police v. Evans* [1982] WLR 1155 at 1173:

> I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed, at p. 96. His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to "a danger of usurpation of power on the part of the Courts i.e. under the pretext of having regard to the principles of natural justice." He added: "I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case".
>
> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the Court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power.

and further at p. 1175 and 1176 his Lordship said:

> It is possible that the respondent would not wish, nor indeed would have any incentive, to pursue a claim for damages. Counsel for the appellant, acting on instructions, told your Lordships that if the decision of your Lordships' House went in favour of the respondent it would be the intention of the North Wales Police to offer him monetary compensation. I trust that the compensation which the Chief Constable has in mind to offer would be on a generous scale, and amply reflect the fact that the respondent has been unlawfully deprived of his profession as a consequence of the wrongful procedures of the Chief Constable's predecessor in office.
>
> I feel that the choice of remedy is a difficult one. It is a matter of discretion. From the point of view of the respondent who has been wronged in a matter so vital to his life, an order of mandamus is the only satisfactory remedy. I have been much tempted to suggest to your Lordships that it would be in the circumstances a remedy proper to be granted. But it is unusual, in a case such as the present, for the Court to make an order of mandamus, and I think that in practice it might border on usurpation of the powers of the Chief Constable, which is to be avoided.

The next argument from Dato' Lingam which also found favour in the learned Chief Justice's judgment is on O. 92 r. 4 of the High Court Rules 1980. Citations from two Malaysian cases were reproduced in the judgment. The first by Edgar Joseph J (as he then was) in *Pacific Centre Sdn. Bhd. v. United Engineers (M) Berhad* [1984] 2 MLJ 143 at 147 read:

> It is also clear that the inherent jurisdiction of the Court includes all the powers that are necessary 'to fulfill itself as a Court of law,' to uphold, to protect and

> to fulfill the judicial function of administering justice **according to law in a regular, orderly and effective manner**. (My emphasis).

I have no quarrel with the above comments by I.H. Jacob in his article entitled, *'The inherent Jurisdiction of the Court'* as published in the Current Law Problems 1970. Indeed, I find this passage read in the light of his words 'according to law' to be suggestive of the writer's assertion that inherent powers should be exercised by the Courts in compliance or consistent with the existing law.

It is interesting to note that the same author also maintained that the jurisdiction which is a complex one possesses several features *viz*: that it is part of procedural law, both civil and criminal, and not of substantive law (p. 24) and that it is a concept which must be distinguished from the exercise of judicial discretion (p. 25).

The second citation is taken from *Dunlop Estate Bhd. v. All Malaysian Estates Staff Union* [1980] 1 MLJ 243 at 246 wherein Mohd. Azmi J (as he then was) remarked:

> In my view, having regard to the principles enunciated in the cases cited, the Industrial Relations Act being a social legislation enacted with the prime object of attaining social justice and industrial peace, demands practical and realistic interpretation whenever necessary, for the purpose of maintaining good relationship and fair dealings between employers and workers and their trade union, and the settlement of any differences or disputes arising from their relationship.

The citation, as I see it, is a general remark on the interpretation of s. 30(7) of the Industrial Relations Act 1967 rather than on the inherent powers of the Court and so is the next cited case i.e. *Nathan v. Barnet London Borough Council* [1978] 1 WLR 220 which deals with purposive approach in interpretation of statute rather than the characteristics of the inherent powers of the Court.

Proceeding on the basis of Jacob's features of inherent jurisdiction and other judicial precedents it would appear that the Court cannot enlarge the power to provide remedy in addition to or in contrast with those already prescribed under any substantive law.

That attitude of the English Courts to leave the matter of relief to be worked out by the lower tribunals is further illustrated by several post amendment cases such as *Ex Barnet London Borough Council Ex parte Nilish Shah* [1983] 2 AC 309: *Attorney General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629; *Regina v. Tower Hamlets London Borough Council Ex parte Chetnik Development Ltd.* [1968] 1 AC 858 and *Regina v. Immigration Appeal*

Tribunal, Ex parte Bakhtuar Singh [1986] 1 WLR 910. All of these authorities, although they do not arise out of industrial dispute nevertheless deal with the principle applicable generally to relief in application for judicial review.

Thus in *Permodalan MBF Sdn. Bhd. v. Tan Sri Datuk Sri Hamzah bin Abu Samah & Ors.* [1988] 1 MLJ 178 Syed Agil Barakbah SCJ when delivering the judgment of the Federal Court said at p. 181:

> Has the Court any jurisdiction to exercise its inherent powers in the instant case? O. 92 r. 4 RHC provides:
>
> 4. For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.
>
> We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the Court so long as it deems it necessary to prevent any injustice or any abuse of its own process. **It follows that where the rules contain provisions making available sufficient remedies, the Court will not invoke its inherent powers**. (My emphasis)

Similarly, in *Nainsingh v. Koonwarjee* AIR [1970] SC 997, Hedge J when commenting on the inherent powers of s. 151 of the Indian Civil Procedure Code which is of similar effect to our s. 92 r. 4 of the Rule of High Court 1980, stated as follows:

> Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of s. 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further the power under s. 151 of the Code cannot be exercised as an appellate power.

Some ten years earlier the Indian Supreme Court had already ruled that the powers saved by s. 151 are not powers over substantive rights and at p. 219 in *Padam Sen v. State of U.P.* AIR [1961] SC the Court in a similar vein expressed that:

> The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in s. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.

In my opinion the inherent powers of the Court as provided under O. 92 r. 4 of the High Court Rules 1980 must not only be exercised subject to other express provision of the Rule but it must also not be in conflict with the intention of the legislature to be found within the Rules or other substantive legislations.

In our present case, the express procedure to be adopted in an application for *certiorari* i.e. to call for the records and quash the tribunal's order appear ostensibly on the face of O.53 of our Rules and the deliberate intention of the legislature to exclude the High Court's powers to assess and award consequential relief either as damages or compensation is evident from Rule Committee's preferred election to adopt the narrower provisions of the preamended 1977 English Rules of the Supreme Court to those of the much wider post amended Rules.

It is not in dispute that the Industrial Court had come to the positive decision that the appellant had been 'dismissed with just cause and excuse.' If that finding is to be transposed into a negative sense, that is to say without just cause and excuse this Court will have to reverse the Industrial Court's decision. Such a reversal, can only be implemented by the exercise of appellate jurisdiction the type of jurisdiction which the Court does not possess in a judicial review and a principle which has been settled by a long line of decisive authorities. The consequential effect to this course of action is to render the assessment and award of compensation to the appellant by the Court to be an act clearly in excess of the Court's jurisdiction.

It has been suggested in the majority judgment that the appellant's personal hardship and the need for exigent remedy are sufficient reasons for this Court not to take the normal course of sending this case back to the Industrial Court for a retrial but in lieu of that to proceed with the award for consequential relief.

With respect, I am unable to agree. The appellant or in any event, his Counsel, must have been aware of the two courses of action open to the appellant i.e. to resort to the remedy by reference to the High Court under s. 33 A of the Industrial Relations Act 1967 or to quash the Industrial Court's order under *certiorari*. He chose the latter and so he should be satisfied with the resulting remedy obtainable from his own choice.

We have been continually reminded and indeed this is also the rationale in the judgment for the granting of consequential relief that the appellant had to wait for a long time for the remedy and this period it was said could go on even longer if we were to remit the case for a retrial. The answer is obvious. If the appellant had to wait for seven years to obtain his remedy, that delay

is not the result of defective legislation but possibly the outcome of a sluggish judiciary.

The legislature in its own wisdom has enacted the Industrial Relations Act 1967 which provides for a specialised tribunal to deal with that particular relationship existing between employers and their employees and in respect thereto has prescribed the mode of settling any disputes that could arise between them. It is apparent from s. 33(4) of the Act, that Parliament had intended, and it has also been judicially recognised, that the tribunal should be the final arbiter at least on question of facts. On the question of law the judiciary has progressively maintained that it has, through the power of judicial review, the powers to exercise supervisory but not appellate jurisdiction. The nature of the supervisory power and the exclusion of appellate jurisdiction are to be found in various legislations such as the Industrial Relations Act 1967, the Courts of Judicature Act 1964, the High Court Rules 1980 and a multitude of undisputed judicial precedents. Under such circumstances is it wise for us to invoke the rules of interpretation or the use of inherent powers to bring the general purpose of the law into line with some special circumstances.

Perhaps the following words of Lord Diplock in the House of Lords case of *Duport Steels Ltd. and Others v. Sirs and Others* [1980] 1 WLR 142 at 157 could provide some guidelines to our judicial conscience:

> When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a *lacuna* in the existing law (whether it be the written law as it has been expounded by the Judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.
>
> A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed; if it had, it would have made some provision in the Act in order to prevent them. It is at least possible that Parliament when the Acts of 1974 and 1976 were passed did not anticipate that so widespread and crippling use as has in fact occurred would be made of sympathetic withdrawals of labour and of secondary blacking and picketing in support of sectional interests able to exercise 'industrial muscle'. But if this be the case it is for Parliament, **not for the Judiciary**, to decide whether

> any changes should be made to the law as stated in the Acts, and, if so, what are the precise limits that ought to be imposed upon the immunity from liability for torts committed in the course of taking industrial action. These are matters on which there is a wide legislative choice the exercise of which is likely to be influenced by the political complexion of the government and the state of public opinion at the time amending legislation is under consideration.
>
> It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if Judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the Court before whom the matter comes consider to be injurious to the public interest.

I would readily agree that inherent powers as contained in O. 92 r. 4 are indispensable implements for use of the Courts to prevent injustice or any abuse of the process of the Court. But the powers themselves stand to be abused if they were to be exercised without circumspection by the Courts. For myself I would undoubtedly use them in cases where Parliament has omitted to provide in the Act something so glaring which obviously ought to have been there. But on no account should these powers be used to defeat the intention of the legislature especially so when it has deliberately excluded the use of such particular remedy from any legislation.

With regret, I am unable to concur with an interpretation that could alter a particular course of justice as enacted by Parliament and in doing so reduce the pronounced principle of supervisory jurisdiction in a long line of judicial precedents, nugatory.

For the aforesaid reasons, I hold that the Court has no jurisdiction to proceed to hear and award compensation after the Industrial Court's order had been quashed.

I would therefore confirm our order to quash the Industrial Court's award but remit the matter for retrial before that Court.

As an epilogue, I would like to place on record that if I have overstated my views I trust that I would be forgiven. This judgment is written with no other motive than a sincere desire to uphold an entrenched principle of the law on judicial review. Dissenting judgments appear to be a rare exception to our judicial lifestyle in these days, but nevertheless Judges should not feel unduly troubled in stating honestly their dissenting views even if they stand in the smallest minority, lest they could be denounced for practising intellectual dishonesty, in arriving at their decisions. Speaking for myself, I would say that dissenting judgments are the surest indication of an honest, independent and alert judiciary.

Edgar Joseph Jr. FCJ:

Some twelve days after the three separate judgments of the members of this Court had been read out in Open Court by the Registrars concerned on 20 July, 1996, I had the advantage of reading the elaborate dissenting judgment of Wan Yahya FCJ, but, with profound respect, find myself unable to agree with his conclusions and shall now endeavour to explain why, though not necessarily in the same order as they appear in the dissenting judgment.

Before I embark upon a response, I should like to point out that it is not without precedent for a dissenter to get answered back by an addition to a joint majority judgment, the addition being drafted by a member of the Court who constituted the majority, and the need for which arose because the majority had not had the advantage of reading the dissenting judgment until after the joint majority judgment was written. (See, *Bradley Egg Farm Ltd. v. Clifford and Others* (Court of Appeal) (Scott and Goddard, LJJ and Bennett J, dissenting) [1943] 2 All ER 378 at p. 386).

Nearer home, in *Collector of Land Revenue, Johore Bahru v. South Malaysia Industries Bhd.* [1978] 1 MLJ 130-134, HRH Sultan Azlan Shah (Raja Azlan Shah, FJ as he then was) found it necessary to write a supplementary judgment dated 5 January 1978 to repair an omission in his principal judgment, dated 25 August 1977, on an important point of law as to the jurisdiction of the Court to entertain an application for relief against forfeiture under s. 237 of the National Land Code.

In the present context, it is worth noting that there is the **additional factor** that the judgments of this Court are not subject to appeal and so there can be no question of a losing party being prejudiced by a supplementation to a judgment.

I must now explain why I find myself unable to agree with the conclusions in the dissenting judgment.

Firstly, the dissenting judgment has laid much stress on the provisions of the proviso to s. 25(2) of the Courts of Judicature Act 1964, ('the proviso to s. 25(2)') which reads:

> Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating to the same.

It argues that the proviso to s. 25(2) is restrictive and specifies the Rules of the High Court 1980, to which s. 25(2) is subject. It points out that under O. 53 of the Rules of the High Court, our Courts are only empowered, in appropriate circumstances, to grant the usual prerogative orders, for example, it can quash an impugned order and, if necessary, send the matter back to the inferior Court or tribunal or other authority for re-hearing, but nothing more.

The dissenting judgment further argues, that although in the United Kingdom, since the introduction in 1977 of the new O. 53 of the Rules of the Supreme Court, the Courts there are empowered to grant a declaration or an injunction or damages or a combination of these remedies yet, in this country, we had opted for the pre-1977 United Kingdom O. 53 which did not provide for the grant of such reliefs. The effect of this, so the dissenting judgment says, is that the most this Court can do, in the present case, is to quash the award of the Industrial Court and remit the case to the Industrial Court to hear and determine the question whether the Employee had been dismissed from service for just cause or excuse and, if it should conclude that the dismissal was wrongful, to decide on the appropriate reliefs to be awarded whether by ordering reinstatement or payment of compensation. Therefore, as regards this part of the case, the dissenting judgment concludes that this Court has no jurisdiction to find that the Employee was dismissed from service without just cause or excuse or to grant the consequential orders prayed for by Counsel for the Employee.

By way of preliminary, there are a few general observations I should like to make regarding the effect of a proviso. As Latham CJ said in *Minister of State for the Army v. Dalziel* [1944] 68 CLR 261 at 274: As a general rule a proviso should not be interpreted as if it were a substantive provision independent of the provisions to which it is a proviso. Speaking generally, a proviso is a provision which is "dependent on the main enactment" and not an "independent enacting clause": *Cf R v. Dibdin* [1910] P. 57 at 125.

And, as D.C. Pearce & R S Geddes have observed in their admirable book *"Statutory Interpretation in Australia"* 3rd Edn. "... it may be that a proviso was inserted out of abundant caution to make it perfectly clear that a section is not to apply in certain circumstances or to certain persons when there is little doubt that it would not have done so anyway. ... The proviso may only have been intended to be declaratory of the intention of the section: *Bretherton v. United Kingdom Totalisator Co. Ltd.* [1945] KB 555, 561." In my view, this was the purpose of the proviso to s. 25(2); it is intended simply to make clear the meaning of what has gone before in the enacting clause.

Most importantly, it is obvious that the provisions of the proviso to s. 25(2) do not affect the **powers** of the Court referred to in para. 1 of the Schedule to the Courts of Judicature Act 1964, ('the Schedule'); they merely control their **exercise** by stipulating that they shall be exercised in accordance with any written law or rules of Court relating to the same. These requirements, in my view, would be silently implied in s. 25(2) even without the proviso.

Next, in my view, the words "in accordance with any written law", are the

equivalent of "not repugnant to", "not in conflict with" or "not inconsistent with" statute law. It follows that recourse may be had to para. 1 of the Schedule to derive jurisdiction to grant the reliefs specified therein unless there is explicit statutory prohibition. As Sri Ram JCA has pointed out, in *Hong Leong Equipment Sdn. Bhd v. Liew Fook Chuan* [1996] 1 MLJ 481 at p. 542, this was the approach adopted by the then Federal Court in *Zainal Abidin v. Century Hotel* [1982] 1 MLJ 260, when it had relied on para. 6 of the Schedule to derive Mareva jurisdiction. I know of no written law which prohibits us from making the orders we had made in this case.

Similarly, turning to the words "in accordance with ... rules of Court relating to the same", all these words mean is that the **procedure** to move an application for the prerogative orders shall be in accordance with the requirements of O. 53. There was no dispute that, in this case, there was before the High Court, an application for judicial review which complied with the **procedure** prescribed by O. 53, seeking to quash the award of the Industrial Court.

The next topic to be logically considered in this context, is the status of the Rules of the High Court 1980.

By s. 17(1) of the Courts of Judicature Act, powers are conferred upon the Rules Committee to make "Rules of Court" **for the purpose of regulating and prescribing the practice and procedure** to be followed in the respective Courts for which each of them is constituted **but** within the strict limits defined by s. 17(2).

The **most decisive limitation** placed on the powers of the Rule Committee, and indeed on other rule-making authorities, is that they extend to regulating the **"practice and procedure"** of the High Court and other Courts for which the Rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do **not** extend into the area of **substantive law**. Clearly, there is a **vital distinction** made between on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by Courts of law or any other tribunal seized with jurisdiction to adjudicate on a dispute before it.

I am fortified in the view I take regarding the legal status of the Rules of the High Court by the following passages in *Halsbury's Laws* (4th Edn.) Vol. 17. para 10:

> The Rules of the Supreme Court are, a form of delegated or subordinate

> legislation, and the Supreme Court Rule Committee is empowered to make rules only within the strict limits defined by statute, whether contained in the Supreme Court Act 1981 or any other Act. The overriding limitation on the powers of the rule committee to make rules is that they must be confined to regulating and prescribing the practice and procedure to be followed in the Supreme Court, and they must **not** therefore extend into the area of substantive law. There is thus at the outset a vital and essential distinction between substantive law, and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. Everyone is entitled to enjoy such legal rights or status but equally is liable to perform or comply with his legal duties. The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a Court of law or other recognised or properly constituted tribunal ...

And, touching on the function of the Rules of the Supreme Court, *Halsbury* says:

> their function is to regulate the machinery of litigation; they cannot confer or take away or diminish any existing jurisdiction or any existing rights or duties. Since they are procedural in character and effect, they cannot enable an action to be brought which could not otherwise have been brought.

This leads me to make a few comments on the introduction in the United Kingdom in the 1977 of the remedy of judicial review, when the new O. 53 entirely replaced the former O. 53 (upon which our O. 53 is based). The scope and operation of the new O. 53 appear clearly in para. 53/1-14/1 of *The Supreme Court Practice* (1979) p. 824. But, what is pertinent to mention, for the present purposes, is that one of the main changes introduced by the new O. 53, was that it provided for the grant of a declaration or an injunction (r. 1(2)) or damages (r. 7) or a combination of these remedies.

Yet, it should not be overlooked, that the new O. 53 was framed largely on the recommendations of the Law Commission made in their *Report on Remedies in Administrative Law* (Law Com. No. 73; Com. 6407 (1976)) which clearly proposed that the reforms should be embodied in an Act of Parliament. (See e.g. the Lord Chancellor's Statement at 415 HL Official Report, ser. 5 col. 1230). It is also noteworthy that the recommendations of the Law Commission were similar to earlier procedural reforms introduced by principal legislation, in **Ontario,** by the Judicial Review Procedure Act, 1971, and in **New Zealand,** by the Judicature Amendment Act, 1972. See now also the Administrative Decisions (Judicial Review) Act 1977, of **Australia**. It is not surprising, therefore, that in the United Kingdom, statutory endorsement was given to the new remedy of judicial review by the Supreme Court Act 1981, so as to ensure that the new O. 53, would be immune to attack or challenge

as being *ultra vires*.

It follows, therefore, that while our O. 53 can **only** prescribe the **procedure and practice** to be followed by parties when applying for judicial review, the source of **power** enjoyed by our Courts to grant relief in judicial review proceedings is the prerogative jurisdiction inherited from the United Kingdom Courts and, most importantly, para. 1 of the Schedule read with s. 25 of the Courts of Judicature Act. The proviso to s. 25(2) and, more particularly, the Rules of the High Court, do not, and indeed cannot, narrow down or diminish or curtail the scope of the **powers** conferred upon our Courts in judicial review proceedings.

With respect, therefore, it is difficult to see how the provisions of the proviso to s. 25(2) can constitute an impediment to our reliance on the provisions of para. 1 of the Schedule in the manner we had in this case.

So much for the proviso to s. 25(2).

Secondly, the dissenting judgment has made the point that it is not open to this Court to find that the Employee has been dismissed from service without just cause or excuse, as this was a question of fact for the Industrial Court by virtue of the Industrial Relations Act 1967.

This point appears to be supported by what Lord Brightman said in *R v. Hillindon L.B., ex parte Puhlhofer* [1986] AC 484 at p. 518 D-E:

> Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable it is the duty of the Court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power ...

However, like most principles, there are important **exceptions,** which tend to blur the conceptual distinction between errors of law and fact. Two of these exceptions which are relevant to the present case must be mentioned; they are:

(1) Reliance upon an erroneous factual conclusion may itself offend against the principles of illegality or irrationality enunciated by Lord Diplock in *Council of Civil Service Unions v. Minister of the Civil Service (ibid).* Indeed, in *ex parte Puhlhofer (ibid),* Lord Brightman made this clear by adding to the passage in his judgment cited above, 'save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely'.

(2) Where there is no evidence to support a conclusion, there is necessarily an error of law in the decision arrived at (See, *Edwards*

v. Bairstow [1956] AC 14; *Din (Taj) v. Wandsworth LBC* p. 664 H per Lord Wilberforce; *R v. Hillingdon LBC ex parte Islam (Tafazzul)* [1983] 1 AC 688 at p. 708 D per Lord Wilberforce and at p. 717 G per Lord Lowry.

But, as Wade and Forsyth, Administrative Law (7th Edn. 1994) have correctly pointed out (at p. 312): 'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding (see, *Allinson v. General Medical Council* [1894] 1 QB 750 at 760, 763; *Lee v. Showmen's Guild of Great Britain* [1952] QB 329 at 345), or where, in other words, no tribunal could reasonably reach that conclusion on that evidence. (See, *R v. Roberts* [1908] 1 KB 407 at 423). This 'no evidence' principle clearly has something his common with the principle that perverse or unreasonable action is unauthorised and *ultra vires.*

As I have said, our conclusion that the Employee had been dismissed from service without just cause or excuse was arrived at as a result of reviewing the award not only for **process** but also for **substance** and, in my view, came within the range of the two exceptions aforesaid.

In reviewing the award for **substance**, I had said, that the legal basis for this, was provided by a wealth of English case law, including those Delphic passages in the judgment of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 dealing with what I referred to as his **"other grounds"** of review, namely, "illegality" and "irrationality" and possibly "proportionality". I had also referred to the decision of the Indian Supreme Court in *Ranjit Thakur v. Union of India* AIR [1987] SC 2386 showing the reach and extent of the review jurisdiction of the Courts in that country.

The matter, however, did not rest there, because as I had said, in my supporting judgment, the jurisdiction of our Courts to grant any of the prerogative orders flows not only from the prerogative jurisdiction inherited from the United Kingdom Courts but, most importantly, from the provisions of para. 1 of the Schedule read with s. 25 of the Courts of Judicature Act, which confer on our Courts far wider powers than those enjoyed by the United Kingdom Courts.

I must next touch on the words "for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose" appearing para. 1 of the Schedule. The word "enforcement" is significant from the point of view of whether we had jurisdiction to find that the Employee had been dismissed from service without just cause or excuse and to make the consequential orders aforesaid.

In *R v. Bates* [1982] 2 NSWLR 894 at p. 895 Samuels JA had to consider the meaning of the word "enforced" and said: "The relevant meaning assigned in the Shorter Oxford English Dictionary is that to enforce means 'to compel observance of'. That I think is the ordinary meaning."

In my view, this is the meaning applicable to the word 'enforcement' in para 1 of the Schedule. That is precisely what I had done when I found that the Employee had been dismissed from service without just cause or excuse and made the consequential orders concerned; I was compelling observance of the right to livelihood which is one of the fundamental rights under Part II of the Constitution.

My view, that the provisions of para. 1 of the Schedule, are to be accorded a broad and liberal treatment, is reinforced by the following observations of Sri Ram JCA, when speaking for the majority in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan (ibid).*

First of all, by way of preliminary, his Lordship said this (at p. 541 H to 542 G):

> I now turn to consider the second and perhaps wider basis of the High Court's power in the field of public law remedies. It is para. 1 of the Schedule to the Courts of Judicature Act 1964 ('the Schedule') which reads as follows:
>
> > Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, or any others for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.
>
> The powers conferred by the Schedule upon a High Court are, according to its terms, 'additional powers', that is to say, powers in addition to those already seised of by that Court. Resort may therefore be had to paragraphs in the Schedule to found jurisdiction to grant relief not expressly prohibited by written law. This is precisely the approach taken by the Federal Court in *Zainal Abidin v. Century Hotel* [1982] 1 MLJ 260, where it relied upon para. 6 of the Schedule to found the Mareva jurisdiction.
>
> Now, it is settled law that a Schedule to a legislative enactment is part of that enactment, and falls to be construed according to its own language and purpose. This approach to the interpretation of Schedules to Acts of Parliament appears in the judgment of Roper CJ (Eq) in *Re Foley* [1952] 53 SR (NSW) 31 at p. 36:
>
> > The Schedule itself, however, is a legislative enactment and is not necessarily wholly constrained by the section of the Act which introduces it, or by its own heading. The principles which ought to be applied in its construction are those set out by Lord Sterndale MR in *IR Commrs v. Gittus* [1920] 1 KB 563 at p. 576:

> It seems to me that there are two principles or rules of interpretation which ought to be applied to the combination of Act and Schedule. If the Act says that the Schedule is to be used for a certain purpose and the heading of the part of the Schedule in question shows that it is *prima facie* at any rate devoted to that purpose, then you must read the Act and the Schedule as though the Schedule were operating for that purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that **you find in the language of the Schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the Schedule or by the purpose mentioned in the Act for which the Schedule is *prima facie* to be used. You cannot refuse to give effect to clear words simply because *prima facie* they seem to be limited by the heading of the Schedule and the definition of the purpose of the Schedule contained in the Act.** (Emphasis added).

It is, therefore, of paramount importance for a Court to have regard to the particular words used by para 1 of the Schedule, and to give them such effect as would advance their intent and purpose.

Next, drawing attention to the nature and amplitude of the remedies contemplated by para. 1 of the Schedule his Lordship said this (at pp. 543 D to 544 A):

> ... it is to be noted that the paragraph primarily deals with public law concepts and public law remedies. The reference to 'any authority', which is a term commonly used in public law, and to the remedies of '*habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*', all of which are public law remedies, reasonably supports this view.

> ... it is plain that Parliament intended that the High Court should be empowered to grant relief which is ordinarily beyond the scope of the usual public law remedies. That intention finds expression in the word 'including' which has been interposed between the phrase 'directions, orders or writs' and the phrase 'writs of the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari,* or any others'. So too, the phrase 'or for any other purpose', with which the paragraph concludes, makes clear the wide area in which the remedies are to operate. These matters, in my judgment, reflect the conferment of a wide power upon the High Court in the matter of public law remedies.

> Consequently, the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our Courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of Court of a jurisdiction which has

an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.

In my judgment, the wide power conferred by the language of para. 1 of the Schedule enables our Courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case.

The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.

Then, to illustrate, his Lordship said this (at pp. 544 A to 544 C):

Assume for a moment that an award of the Industrial Court upholding the dismissal of a workman is quashed by *certiorari*. The ordinary course – and this is the course that would be taken by an English Court – would be to remit the matter to the Industrial Court by way of mandamus to compel it to rehear the case. But the resultant delay and the inevitable result in the workman's favour may well be compelling factors to justify the award of relief by the High Court.

In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal.

Thus, it was my view, that in appropriate circumstances, our High Courts have the **power** not merely to quash an award of the Industrial Court but to go on to make a finding that an Employee has been dismissed from service without just cause or excuse, and when necessary, to award fair compensation. Consequently, on appeal from the judgment of the High Court to this Court, we too, as an Apex Court, with full appellate powers, must have the same power.

In any event, reflection reveals that on a further ground also we were empowered not merely to quash the award of the Industrial Court but also to make a finding that the Employee had been dismissed from service without just cause or excuse, and to go on to make the consequential orders for fair compensation.

The present appeal was brought by notice of appeal dated and filed on 6 January 1994, and lay directly to the Supreme Court (the predecessor of this Court) by reason of the provisions of s. 67(1) of the Courts of Judicature Act 1964, in the form that it took prior to its amendment on 24 June 1994, by the Court of Judicature (Amendment) Act 1994 (Act A 909) s. 12, when the words "Court of Appeal" were substituted for the words "Supreme Court".

It follows that the powers exercisable by this Court when hearing this appeal would, by reason of s. 30 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised - 1989), be the powers provided for by sub-s. (4) of s. 69 of the Courts of Judicature Act, which gives this Court power not only to make any order which ought to have been made but also to **"make such further or other order as the case may require."** (See, e.g. *Sungei Biak Tin Mines Ltd. v. Saw Choo Theng & Anor.* [1970] 2 MLJ 226). Rule 51(4) of the Rules of the Supreme Court 1980, (in *pari materia* with sub-s. (4) of s. 69 of the Courts of Judicature Act) and applicable to the present appeal by reason of r. 138 of the Federal Court Rules 1995, points to the same conclusion. These powers are sufficient to enable us to find that the Employee had been dismissed from service without just cause or excuse and to make consequential orders for fair compensation.

So much for our powers. The next topic to be logically considered is the exercise of those powers.

It will be recalled that before the High Court, the award of the Industrial Court was challenged not only for process but also for **substance** as being **manifestly perverse.**

To recapitulate, the case for the Employee at all levels, in effect, was that the act of the Employer in terminating his services by the letter dated 20 April 1988, although ostensibly in pursuance of a retrenchment exercise was really a device to cloak a *mala fide* exercise of power or, in other words, an act of victimisation, thus avoiding a fair enquiry into certain baseless allegations of misconduct which the Employer had no intention of pursuing. Indeed, the learned Judge in the High Court had found that the Employer had decided to give the Employee the benefit of the doubt regarding them. In other words, the case for the Employee was that this was not a redundancy situation at all; the letter of termination was really a cover up for the Employer's inability to establish those allegations by fair enquiry and the ulterior purpose of the exercise was to get rid of the Employee because "he was a evil to be eliminated". Counsel for the employee relied on the Indian Supreme Court decision of *L. Michael and Anor. v. M/s. Johnson Pumps India Ltd.* [1975] 1 LLJ 262 to support this point.

At this stage, I should like to pray in aid certain findings which appear in the dissenting judgment.

In the first place, the dissenting judgment accepts that the Industrial Court had misunderstood the Employee's case, and "that the issues raised by the employee were very pertinent and if accepted by the Court, it would have negated the employer's claim that termination was due to redundancy" (See, p. 2 para. 1 of the dissenting judgment).

In the second place, the dissenting judgment concludes, as regards this part of the case, "the failure of the Industrial Court to consider the issue raised by the appellant amounts to a serious error of fact and law which affected the jurisdiction of that Court" (See, p. 4 para. 2 of the dissenting judgment).

In the third place, the dissenting judgment "fully supports the first part of the Chief Justice's judgment and the order to quash the decision of the Industrial Court." (See, p. 5 para. 1 of the dissenting judgment).

I must now direct attention to the present proceedings.

Before us, on the first day of the hearing on 22 March 1995, the whole of the material evidence appearing in the Record of Appeal (which included the entire proceedings in the High Court and the Industrial Court) relevant to the issue of whether the Employee had been dismissed from service for just cause or excuse, was examined by Counsel for the Employee with some care and it is unnecessary to discuss it again.

Suffice it to say, that Counsel for the Employee had, *inter alia*, cogently argued that although there was before the High Court, an affidavit of the Employee (pp. 57/63 of the Record of Appeal) containing substantial particulars of the alleged circumstances leading up to the letter of termination aforesaid, and claiming that the decision of the Industrial Court that the Employee had been dismissed from service for just cause or excuse was, by reason thereof, "patently erroneous and manifestly perverse", yet it had not been contradicted by the employer by counter affidavit, with the result, that its contents are deemed to be admitted. Counsel for the Employer, Mr. Karthigesu (Dr. Das not having yet been retained), did not respond to this submission.

With due respect, I must also add that nowhere in the dissenting judgment has this important submission been mentioned which leaves me with the impression that it has been overlooked.

Now, at an application for judicial review, evidence is normally presented in the form of affidavits. I must therefore touch on the appreciation of affidavit evidence in judicial review proceedings.

In England, the Divisional Court labours under no **inherent** disability to resolve disputed facts. The observation that judicial review process is unsuitable for resolving factual disputes ought not, therefore, to be overstated.

In the book entitled *"Judicial Review"* by Michael Supperstone QC, and James Goudie QC, under the topic of "Evidence" I find the following passage (at p. 378): "The fact that evidence is given by affidavit does not mean that the Court is unwilling or unable to resolve any disputes of fact that should arise. Where there is a conflict of evidence on the affidavits, but the

probabilities can be shown to favour one account over the other, the Court can act on that factual footing". *a*

In this, I think, the authors are correct. I note, for example, in *Chief Constable of North Wales Police v. Evans* [1982] 1 WLR 1155, HL, there was a "conflict of evidence as to the interviews" as to which, on appeal to the House of Lords, Lord Bridge (at 1165 F) preferred Evans's version "on the probabilities". So also, in *Leach v. Deputy Governor of Parkhurst Prison* [1988] AC 533, the ability to resolve factual disputes was a central point of the rejection of *R v. Deputy Governor of Camphill Prison, ex parte King* [1985] QB 735. *b*

In India, there is authority for saying that in judicial review proceedings, the Court is inclined to hold that the normal rule of pleadings applies, so that it is necessary that material averments of fact in the return, must either affirm or deny the allegations made in the affidavit filed in support of the petition, and such averments, if not denied in the return, must be taken to have been accepted. (See, e.g. *Ramarao Laxmikant Shirkhedkar v. Accountant General, Maharashtra* AIR [1963] Bom. 121) Similarly, the Supreme Court decision in *Rowjee v. State of AP* AIR [1964] 6 SC 962, shows that in such proceedings a material averment in the affidavit filed in support of the petition, alleging that those in power were motivated by bias and personal ill-will against the petitioner, which is not traversed by respondents by counter-affidavit giving their version of the denial must be taken as admitted. Other authorities on the need for counter-affidavits by persons having personal knowledge of the facts, where there are allegations of *mala fides* are: *Pratap Singh v. State of Punjab, A.* [1964] SC 72: *Narayan v. State of AP,* A [1971] SC 1713 and *M.P. Industries v. Income Tax Officer Nagar* AIR [1970] SC 1011. *c* *d* *e* *f*

To recapitulate, the importance of the allegations by the Employee as to the circumstances surrounding the purported termination of his services was rightly recognised in the dissenting judgment where it is conceded that " – there were ample allegations of biasness, victimisation and previous attempts to terminate the claimant's service through charges of misconduct, ..." which allegations "... if accepted by the Court – would have negated the employer's claim that termination was due to redundancy." Indeed, the allegations if accepted, would show that the purported termination was so unreasonable that it might be described as being done in bad faith. (See, *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223, 229 per *Greene M.R. and L. Michael & Anor. v. M/s. Johnson Pumps Ltd.* [1975] 1 LLJ 262). *g* *h*

But, with respect, what appears to have been overlooked in the dissenting judgment is the contention of Counsel for the Employee that these allegations made on affidavit which were most material had not been contradicted by *i*

counter affidavit on behalf of the Employer and are deemed to be admitted. To hold contrary to this contention, would have been to fly in the face of the uncontroverted affidavit evidence. Once these allegations are deemed admitted, as they undoubtedly should have been, I fail to see what useful purpose would be served by remitting the case to the Industrial Court to determine the question whether the Employee's dismissal from service was for just cause or excuse. In such a situation, involving as it does a man's livelihood, he should not be exposed to the hazard, anxiety and delay of proceedings before a freshly constituted tribunal and, thus, to the risk of misapplication of the Law.

In any event, at the end of the argument, regarding this part of the case, I was satisfied, upon the **whole** of the evidence appearing in the record of appeal, that the Award of the Industrial Court was flawed on grounds of *Wednesbury* unreasonableness and that the Employee had been dismissed from service without just cause or excuse; in other words, wrongfully. The appeal was then allowed.

It was at this stage that Counsel for the Employee raised the question of consequential orders for the payment of compensation for our consideration, whereupon, Counsel for the Employer Mr. Karthigesu, objected saying that we had no jurisdiction to decide this question and adding that he needed more time to prepare this part of the case. I also seem to recall that Mr. Karthegesu indicated that he might want to retain the services of leading Counsel. We granted his request and the appeal was thereupon adjourned to a date ten days later.

When hearing of the appeal resumed, the employer had the advantage of the services of eminent Counsel Dr. C.V. Das and Mr. Karthigesu as Junior Counsel. The Employee continued to be represented by Dato' Lingam. At the conclusion of the arguments, we had reserved judgment.

As I had said in my supporting judgment, it appeared that all the material evidence for the purpose of assessing the monetary compensation payable was before us, and indeed, there was no suggestion to the contrary by learned Counsel for the Employer, Dr. Das. Had there been such a suggestion, then no doubt, we would have had to consider whether or not to remit the matter to the Industrial Court with a direction to assess the compensation payable. But, in the event, all that appeared to be required was a simple arithmetical calculation and this was why I concluded: "In the very special circumstances of the case, to remit the case to the Industrial Court to assess the monetary compensation payable by the Employer to the Employee would seem to be a certain detachment from reality and, more importantly, it will not answer the needs of justice."

Thirdly, the dissenting judgment has also made the point that it was inappropriate for us to have made the consequential orders concerned, because before the Industrial Court, the Employee had prayed for reinstatement: so the question whether he should be reinstated or paid compensation, was a question of fact for the determination of the Industrial Court, and not this Court. In carrying out that function, the Industrial Court would have to exercise a discretion regard being had to all the evidence before it and not just the affidavit evidence. This, the dissenting judgment argues, affords a further ground why we should have refrained from making the consequential orders concerned.

With respect, this criticism overlooks the point that before us, on the question of consequential reliefs, Counsel for the Employee had confined his contention to compensation. Therefore, no other order except that of compensation would have been appropriate and so reinstatement had ceased to be an issue.

Fourthly, the dissenting judgment has made the point that it would be wrong for us to derive analogical support from Indian cases on Article 226 of the Indian Constitution for two reasons: (1) no opportunity had been accorded by this Court to Counsel for the Employer to argue this point and (2) in any event, the provisions of Article 226 and our para. 1 of the Schedule are materially different.

As to point (1): this criticism overlooks the fact that although Counsel for the Employee, did not in the course of his argument before us specifically refer to Article 226, he had in his bundle of authorities, a copy of which had been served on his opponent, included a number of Indian decisions on employment law, one of which at least – *L. Michael v. M/s. Johnson Pumps Ltd.* [1975] 1 LLJ 262, referred to without disapproval by our old Federal Court in *Dr. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, at 312 – contains a cited extract wherein specific reference is made to Article 226. Moreover, during the argument, Counsel for the Employee had cited the case of *L. Michael* in support of his plea of "victimisation" (See, pp. 77 para. 2 to 78 para. 1 *ante*). This should have been sufficient to put Counsel for the Employer on notice, regarding the Article 226 point. It is therefore difficult to see how it could be said that Counsel for the Employer was deprived of the opportunity of dealing with the Article 226 point and generally with regard to the applicability of Indian decisions.

In these circumstances, for myself, I regret, I cannot agree that the observations of their Lordships of the Privy Council in the Hong Kong Privy Council case of *Hoe Cheong Products Co. Ltd. v. Carqill Hong Kong Ltd.* [1995] 1 WLR 404, reproduced in the dissenting judgment, have any bearing on this part of the case.

In any event, in that case, the Court of Appeal of Hong Kong had decided the appeal on an entirely new question of law not raised by the parties as to which there had been insufficient exploration of the facts at the trial to enable the new point to be taken. The situation in the present appeal is totally different.

Here, the purely legal question was whether analogical support could be derived from Article 226 and the Indian cases decided thereon, for the purpose of assisting in the determination of a fiercely contested issue concerning the extent of the jurisdiction of our High Courts in the field of public law remedies. This question of analogical support was by way of makeweight only and not therefore a decisive factor upon which the result of the appeal depended. It also required no exploration of the facts.

As to point (2), this raises the question whether our para. 1 of the Schedule is equivalent to the Indian Article 226. In my view, the law on this point and the consequences which flow from it, have been correctly stated by Sri Ram JCA in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan (ibid).*

First of all, his Lordship drew attention to analogous law both in the United Kingdom and in India, and expressed the opinion that our para. 1 of the Schedule was equivalent to Art. 226 of the Indian Constitution and, that therefore, Indian case law was entitled to greater weight than case law from the United Kingdom or other Common Law countries (at pp. 542 H to 543 C) where there was no equivalent provision. This is how he put it:

> ... it is to be noted that the paragraph is not based upon or drawn from any United Kingdom statute. The United Kingdom's Supreme Court Act 1981 has no provision that bears close resemblance to para. 1. The paragraph is, however in *pari materia* with Art. 226(1) of the Indian Constitution which reads as follows:
>
> > Notwithstanding anything in Art. 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any government, within those territories, **directions, orders or writs,** including **writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the right conferred by Part III and for any other purpose**.
>
> For completness, I would add that Part II of the Federal Constitution which contains the fundamental liberties guaranteed by the supreme law, and which finds mention in para. 1 of the Schedule, is the equivalent of Part. III of the Indian Constitution.
>
> It follows that, because of the close resemblance in the language of these two provisions – para. 1 of the Schedule and Art. 226 of the Indian Constitution – the decisions of Indian Courts upon the analagous provision are to be accorded greater weight when determining the width of the power conferred by the

paragraph, than decisions of Courts in those jurisdictions where the equipollent provision is absent. These jurisdictions include England, Australia, New Zealand and Canada.

Secondly, drawing attention to the more affirmative role of the Courts in India compared to their counterparts in England, in the field of public law remedies, his Lordship cited two decisions of the Supreme Court of India, in one of which the Court instead of merely quashing the order of a tribunal, and remanding the matter to the tribunal to pass a suitable order, itself passed the necessary order to avoid prolonging the dispute which might not have been fair or conducive, to the interests of the parties (at pp. 544 E to 545 A). This is what he said:

I notice that in the field of public law remedies, Indian Courts, acting on the words of Art. 226(1), have adopted a more flexible stance than their English counterparts.

In *Hindustan Steel Ltd. Rourkela v. Roy, AK* AIR 1970 SC 1401, the Supreme Court of India, having quashed an order of reinstatement made by the Industrial Tribunal, went on to make an award of compensation. The basis upon which this was done appears in the following passage in the judgment of Shelat J at p. 1407 of the report:

> The question next is, having held that the order of reinstatement was not a proper order, in that, it was not in consonance with the decided cases, do we simply quash the order of the tribunal and that of the High Court and leave the concerned workman to pursue his further remedy? The other alternative would be to remand the case to the tribunal to pass a suitable order. In either case, in view of this judgment, no other order except that of compensation can be obtained by him. If the case is remanded and the tribunal on such remand passes an order of compensation and fixes the amount such a course would mean further proceedings and a possible appeal. That would mean prolonging the dispute, which would hardly be fair to or conducive to the interests of the parties. In these circumstances we decided that it would be more proper that we should determine the amount of compensation which would meet the ends of justice.

In *Variety Emporium v. Mohd Ibrahim*, AIR [1985] SC 207, Chandrachud CJ considered the principle to be well-settled. He said (at p. 210):

No authority is needed for the proposition that, in appropriate cases, the Court must have regard to events as they present themselves at the time when it is hearing the proceeding before it and mould the relief in the light of those events.

The dissenting judgment has also expressed the view that unlike in India, where the power of the High Court in judicial review proceedings is conferred by the Constitution, to wit, Article 226, in this country, the source of such power is an ordinary Act of Parliament, to wit, the Courts of Judicature Act, and so

can be modified by another Act of Parliament, as for instance, the Rules of the High Court 1980.

I had, when discussing the status of the Rules of the High Court, quoted Halsbury's Laws of England 4th Edn.) Vol. 37, para. 10, which it will be recalled shows that although the Rules are a form of delegated legislation, "their function is to regulate the machinery of litigation; they cannot confer or **take away or alter or diminish** any existing jurisdiction or any existing rights or duties." The Rules of the High Court cannot therefore extend into the area of substantive law and the powers of the Court in judicial review proceedings fall within the area of substantive law, to wit, para. 1 of the Schedule read with s. 25.

With respect, therefore the powers of the Court under para. 1 of the Schedule cannot be modified by the Rules of the High Court. I would also, in answer, pray in aid my comments on the proviso to s. 25(2) and its effect, which appear at pp. 210b to 213f *ante*.

Fifthly, the dissenting judgment has expressed the view that we should disregard the fact that if this matter were remitted to the Industrial Court to hear and determine the case according to Law, it would entail unnecessary prolongation of proceedings, consequent delay and undue hardship to the Employee because:

(1) it was open to the Employee to have proceeded by way of Reference under s. 33A of the Industrial Relations Act 1967, or by way of judicial review under O. 53. Had the Employee chosen the former course, the High Court would have had full appellate powers and could by reason of sub-s. 5 of s. 33A "hear and determine the question referred to it as if the Reference were an appeal, and consequently, confirm, vary, substitute or quash the award, or make such other order as it considers just or necessary." But the Employee chose to pursue the latter course, that is, to apply for judicial review under O. 53, and the powers of the Court in such proceedings being supervisory are not as extensive as those exercised in proceedings by way of Reference to the High Court on a question of law under s. 33A. In other words, if there was to be undue delay, the Employee was the author of his own misfortune, and

(2) "If the appellant had to wait for seven years to obtain his remedy, that delay is not the result of defective legislation but possibly the outcome of a sluggish judiciary".

As to (1): This point depends for its validity on two **assumptions,** namely:

(a) The powers of the High Court in the field of public law remedies in this country are limited to the extent stated in the dissenting judgment, and

(b) The Employee was bound to have succeeded had he proceeded by way of a Reference to the High Court pursuant to the provisions of s. 33A of the Industrial Relations Act 1967.

With respect, neither of the above **assumptions** is well-founded because:

With regard to assumption (a): The view of the majority in this case is that the powers of the High Court in the field of public law remedies, is **not** limited as aforesaid, but broad enough to have justified this Court to have made the orders that the Employee had been dismissed from service without just cause or excuse and for the payment of compensation to him.

With regard to assumption (b): It is impossible to say that had the Employee proceeded by way of a Reference under s. 33A to the High Court, he was bound to have succeeded. It is axiomatic, that the prospects of success or failure in litigation can seldom, if ever, be predicted, with certainty. He may, as likely as not, have failed, and had he failed, his case would have ended in the High Court for there is no provision enabling him to take the matter further to a higher Court. But having – as it turned out, wisely – elected to proceed by way of Judicial Review under O. 53, and failed in the High Court he was able to successfully take his case up to this Court.

In these circumstances, it is difficult to see, how the employee could be criticised for having elected to proceed by way of judicial review under O. 53 instead of a reference on a question of law under s. 33A. Indeed, from his point of view, it is fortunate that he did so.

Having said that I must add that, although our High Courts are vested with broad and ample powers under para. 1 of the Schedule, this is not to say, that there are no differences between their powers when hearing a reference under s. 33A of the Industrial Relations Act 1967, as compared to an application for judicial review under O. 53. Indeed, the differences are most material.

Unlike a Reference under s. 33A, Judicial Review is a discretionary jurisdiction. Each stage of the process of judicial review is discretionary, particularly, threshhold stage of whether leave to commence proceedings, will be granted, and, if granted, ultimately, whether any and, if so, what remedies are granted.

The more obvious discretionary bars upon which the Court may in the exercise of its discretion, or as a matter of evaluation, decline relief in Judicial Review proceedings, although the case may otherwise be well-grounded, are these:

(1) that the applicant lacks sufficient interest.

(2) that the remedy would be of no practical benefit:

(3) having regard to (a) delay or (b) other aspects of the applicant's conduct;

(4) because of the effect of granting relief;

(5) because of the availability of alternative remedies;

(6) where the issue is the criminality or otherwise of future conduct; and

(7) in case a procedural requirement not being met where the failure is 'technical' and of no practical effect.

None of the above discretionary bars applies to reference proceedings under s. 33A. However, as I have said, unlike an applicant in Judicial Review proceedings, should an applicant in a Reference under s. 33A fail in the High Court, the matter ends there for there is no provision enabling him to take the matter further.

As to (2), with due respect, the remarks about "a sluggish judiciary" being possibly the cause of delay in the disposal of cases, are open to the criticism that they amount to a mere theory unsupported by evidence, and even if true, it is difficult to see how they could be material to the point under discussions, since the Employee could hardly be blamed for such delay.

Before moving on to the next point, there are some general observations I should like to make regarding the topic of hardship to the Employee caused by delay occasioned by unnecessary prolongation of proceedings.

There is a vital juridical distinction between jurisdiction and discretion. It is obvious that hardship is relevant only to the exercise of discretion and not to the question whether there is jurisdiction. It is only when the Court has the jurisdiction to make an order and is considering its exercise that hardship may be a relevant consideration. We had directed ourselves accordingly.

Sixthly, the dissenting judgment has criticised reliance on the inherent jurisdiction of the High Court, of which we are reminded by O. 92 r. 4 of the Rules of High Court 1980. It argues (at p. 56 para. 1):

> "... But the powers themselves stand to be abused if they were to be exercised without circumspection by the Courts. **For myself I would undoubtedly use them in cases where Parliament has omitted to provide in the Act something so glaring which obviously ought to have been there**. But on no account should these powers be used to defeat the intention of the legislature especially so when it has deliberately excluded the use of such particular remedy from any legislation" (Emphasis provided).

Whilst I entirely agree that the Court is not at liberty to resort to its inherent powers in violation of a statutory provision, regret I cannot agree with the suggestion that their use should be confined to situations where "Parliament has omitted to provide in the Act (concerned) something so glaring which ought obviously to have been there". In this, I am supported by the following observations by Sir Jack Jacob QC, the former Senior Master of the Supreme

Court in the United Kingdom, in his article *"The Inherent Jurisdiction of the Court"*, [1970] Current Legal Problems 23.

Explaining the nature of inherent jurisdiction the learned author said this (at p. 24):

> "... the Court may exercise its inherent jurisdiction **even in matters which are regulated by statute or by rule of Court**, so long as it can do so without contravening any statutory provision ..." (Emphasis provided)

The learned author then distinguishes between the inherent jurisdiction and the statutory jurisdiction, as follows (at p. 24):

> "The source of the statutory jurisdiction of the Court is, of course, the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the Court is derived from its nature as a Court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition"

The learned author then directs attention to the point that the powers conferred by the Rules of Court are generally **additional to and not in substitution** of the powers arising out of the inherent jurisdiction of the Court, in these terms (at p. 25):

> "The inherent jurisdiction of the Court may be exercised in any given case, **notwithstanding that there are Rules of Court governing the circumstances of such case**. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the Court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the Court is able to proceed under either or both heads of jurisdiction" (Emphasis provided)

Explaining the **judicial basis** of inherent jurisdiction, the learned author says this (at p. 27):

> "... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the Court as a superior Court of law, and for this reason such jurisdiction has been called 'inherent'. This description has been criticised as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior Court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior Court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the Court would have form but would lack substance. The jurisdiction which is inherent in a superior Court of law is that which enables it to fulfil itself as a Court of law"

Defining inherent jurisdiction, the learned author said this (at p. 51):

> "... the inherent jurisdiction of the Court may be defined as being the reserve or fund of powers, a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them"

Explaining the **relation between the inherent jurisdiction and the Rules of Court,** the learned author says this (at p. 50):

> "The powers of the Court under its inherent jurisdiction are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other. The inherent jurisdiction of the Court is a most valuable adjunct to the powers conferred on the Court by the Rules"

And, in the next para explaining the usefulness of the inherent jurisdiction he adds (at pp. 51):

> "On the other hand, where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins. This is shown in three important respects in which the powers arising out of the inherent jurisdiction differ from those conferred by Rules of Court. First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by enabling the Court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings. Thirdly, they can be used to punish the offender by fine or imprisonment"

In the Singapore case of *Heng Joo See v. Ho Pol Ling* (Divorce Petition No. 94 of 1993), Coomarasamy J put O. 92 r. 4 (RSC) and O. 79 r. 4 (SCR), (identically worded to our O. 92 r. 4 Rules of the High Court 1980) in its correct perspective when he said, it does "not define or give the jurisdiction ... It merely states that the Rules of Supreme Court shall not limit or affect the inherent powers which are common law powers" The learned Judge went on to accept the definition of inherent powers formulated by Sir Jack Jacob, quoted above. (See also, the interesting comments by Mr. Jeffrey Pinsler in his well researched work on Civil Procedure at pp. 18, 19).

In my view, O. 92 r. 4 is a unique Rule of Court for while it neither defines nor gives jurisdiction, yet it serves as a **reminder** and **confirmation** – lest we forget – of the common law powers of the Court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the Court.

In other words, even without O. 92 r. 4, the inherent powers of the High Court would still be there. In the United Kingdom, for instance, there is no provision in the Supreme Court Rules, equivalent to our O. 92 r. 4, yet the inherent powers occupy a position of great importance in the High Court there as the article by Sir Jack Jacob amply demonstrates. And, the Court of Appeal there also exercises an inherent jurisdiction (see, *Aviagents v. Balstravest Investment* [1966] 1 WLR 150) notwithstanding the absence of any provision in any written law or rule of Court providing for inherent powers.

Similarly, I have no doubt that in this country, the Court of Appeal and the Federal Court also exercise inherent jurisdiction. And lest we forget, at the risk of repetition, supervisory jurisdiction is the creature of the common law and is available in the exercise of the Court's inherent power though its extent may be determined not merely by judicial development but also by legislative intervention, as for example, para. 1 of the Schedule read together with s. 25 of the Courts of Judicature Act.

Finally, a word or two about the "Epilogue" in the dissenting judgment. I do unreservedly accept the laudable observation that if a Judge feels strongly about not going along with the majority, then he should enter a dissent. However, the observation that dissenting judgments in the Federal Court are a rare exception these days is open to challenge. (See, e.g. the as yet unreported decision of the Federal Court in *Arulpragasan a/l Sandaraju v. PP* (Criminal Appeal No. 05-227-92), where the Court was split 4-3, *Seet Chuan Seng & Anor. v. Tee Yih Jia Food Manufacturing Pte. Ltd.* [1994] 2 MLJ 770, where Eusoff Chin SCJ (as he then was) dissented, *Chan Chin Ming & Anor. v. Lim Yok Eng* [1994] 3 MLJ 235, where I dissented, *Wee Choo Keong v. MBF Holdings Bhd. & Anor.* [1995] 3 MLJ 549, where Chong Siew Fai CJ (Sabah & Sarawak) dissented, and *Pengiran Osman Shah bin Pengiran Mohd. Yusof v. Karam Bunai Resort Sdn. Bhd. & 3 Ors.* (Unreported, 08-31-95), where Wan Adnan bin Ismail FCJ dissented in an application for leave, to give but five recent examples, offhand).

Similarly, the observation that dissenting judgments are "the surest indication of an honest, independent and alert judiciary", is open to criticism; see, for example, R.H. Jackson J, in the Supreme Court in the American System of Government [1955] at p. 18:

> "The right of dissent is a valuable one. Wisely used on well-chosen occasions, it has been of great service to the profession and to the law. But there is nothing good, for either the Court or the dissenter, in dissenting *per se.* Each dissenting opinion is a confession of failure to convince the writer's colleagues, and the true test of a Judge is his influence in leading, not in opposing, his Court"

For myself, I believe that our view on the powers of the Court in judicial review proceedings, although they constitute a departure from previous cases decided in this country to which I have referred, is a progressive one, and in giving effect to them we derive comfort from the famous words of Lord Justice Denning (as he then was) in his dissenting judgment in the case of *Candler v. Crane, Christmas & Co.* [1951] 2 KB 164, regarded by lawyers, almost without exception, as a brilliant advancement of the law of negligent mistatement, vindicated triumphantly some twenty years later in the House of Lords of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465:

> "This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress, and it has always, or nearly always, been rejected. If you read the great cases of *Ashby v. White*, *Parsely v. Freeman* and *Donoghue v. Stevenson* you will find that in each of them the Judges were divided in opinion. ***On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required.*** It was fortunate for the common law that the progressive view prevailed" (Italics provided)

The words of Lord Denning, although uttered in a different context, can in appropriate circumstances, serve as a guide, to a Judge when an argument of novelty is put forward, as happened in the present case.

The learned Chief Justice has perused this addition and asked me to say that he wishes to associate himself with its contents.

Reported by Prof Ahmad Ibrahim